ORIGINAL

No. 11936

In The

United States Circuit Court of Appeals

For the Ninth Circuit

WILLAPOINT OYSTERS, INC., *Petitioner*

vs.

OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*

PETITIONER'S OPENING BRIEF

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Dated: October 25, 1948.

THE ARGUS PRESS, SEATTLE

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WILLAPOINT OYSTERS, INC., *Petitioner*, vs. OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*	No. 11936

PETITIONER'S OPENING BRIEF

STATEMENT OF JURISDICTION AND PLEADINGS

This is a petition for judicial review of two Final Orders of the Federal Security Agency prescribing standards of identity and standards of fill for canned oysters. The *First Final Order* was issued March 10, 1948, by respondent, Hon. Oscar R. Ewing, Federal Security Administrator. The *Second Final Order* was issued August 3, 1948, by respondent, Hon. J. Donald Kingsley, Acting Federal Security Administrator.

I. Opinions Below

The First and Second Final Orders were dated March 10, 1948, and August 3, 1948, respectively, and are attached to petitioner's first supplemental petition for judicial review filed herein September 13, 1948, as Appendices A and B thereof. They are reported

respectively in the Federal Register of March 13, 1948, and of August 12, 1948, 13 F.R. 1337-9; 4653-4. For convenience, they are again reproduced herein as *Appendices A and B* hereof.[1]

II. Statutory Provisions to Sustain Jurisdiction

The jurisdiction of this court is invoked under Section 701(f)(1), (3), (6) of the Federal Food, Drug, and Cosmetic Act [52 Stat. 1055; 21 U.S.C.A. (Supp.) 371(f)(1), (3), (6)]. It provides in part:

> "(1) In a case of actual controversy as to the validity of any order * * * any person * * * adversely affected * * * may * * * file a petition with the Circuit Court of Appeals * * * for a judicial review of such order. * * * "

This case presents an actual controversy. Petitioner would be adversely affected if either of the two Final Orders become effective. Petitioner so alleged in its original petition for judicial review filed May 22, 1948, for judicial review of respondents' First Final Order, and in petitioner's supplemental petitions filed September 13, 1948, for judicial review of respondents' Second Final Order.

Section 701 (f) further provides in part:

> "(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in

[1]It will be noted that the First Final Order of March 13, 1948 (App. A hereof, page 7), refers to a prior final order dealing with canned oysters effective in 1945. Reference to said order discloses in turn certain earlier decisions of predecessors of the Food and Drug Administration and the Department of Agriculture relating to canned oysters. The full text of these pertinent prior regulations are assembled for convenience as Appendices C and D hereof.

part, temporarily or permanently. If * * * such order is not in accordance with law the court shall * * * order the Administrator to take action * * * in accordance with law. * * * "

The original petition for judicial review and supplemental petitions filed herein allege the many respects in which both orders are "not in accordance with law" and pray that both orders be permanently set aside.

Section 701(f) further provides in part:

"(6) The remedies provided * * * shall be in addition to * * * any other remedies provided by law."

The remedies provided by §10 of the Administrative Procedure Act [60 Stat. 243, 5 U.S.C.A. (Supp.) 1009(e)] are also invoked. It provides in part:

"(e) So far as necessary to decision * * * the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * hold unlawful and set aside * * * findings, and conclusions found to be (1) *arbitrary, capricious,* an *abuse of discretion* * * * (2) *contrary to constitutional right* * * * (3) *in excess of statutory jurisdiction* * * * (4) *without observance of procedure required by law;* (5) *unsupported by substantial evidence* * * *. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, * * * ."[2]

The original and supplemental petitions for judi-

[2]Italics for emphasis are supplied throughout this brief unless otherwise noted.

cial review filed herein allege, in detail, that both said Final Orders violate the Administrative Procedure Act in each of the five above enumerated respects.

III. Transcript of Proceedings Before the Administrator

Section 701(f) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C.A. (Supp.) 371(f)(1)] further provides in part:

> "(1) * * * The Administrator, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Administrator based his order."

Pursuant thereto, the Federal Security Administrator and the Acting Federal Security Administrator, respectively, have filed with this court, the transcript of the proceedings and the record upon which each such respondent certified that he based his respective execution of the *First Final Order* of March 10, 1948, and of the *Second Final Order* of August 3, 1948.

On June 7, 1948, this court entered an order granting petitioner's motion to present this cause on a typewritten transcript of the record.

In conformity therewith, petitioner, on September 13, 1948, filed in this court three true copies of the transcripts of proceedings and records in form identical to those certified to by the Administrator and by the Acting Administrator, respectively. An additional or fourth copy thereof was served on counsel for respondents.

References herein will be made to that record.[3]

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[3]The transcript of proceedings before the Federal Security Administrator consists of *Vol. I*, *Vol. II*, and *Vol. III* of the *Original Transcript of Record* which was certified to by respondent Ewing and filed with this court June 3, 1948, and of *Vol. I*, *Vol. II*, *Vol. III*, and *Vol. IV* of the *Supplemental Transcript of Record* which was certified to by respondent Kingsley and filed with this court on August 10, 1948.

References to these volumes will be herein designated as *Orig. Vol. I*, etc., and *Supp. Vol I*, etc., respectively.

The record of hearings before the Administrator and Acting Administrator, and exhibits received therein are serially paged and serially numbered, respectively, pages 1 to 701, and Exhibits 1 to 21, inclusive, contained in *Orig. Vol. II* and *Orig. Vol. III* of the *Original* 3 volumes; and pages 702 to 1178, and Exhibits 22 to 42, inclusive, contained in *Supp. Vol. I* and *Supp. Vol. II* of the *Supplemental* 4 volumes.

References to pages of the record of hearings and to exhibits received will be herein designated, respectively, as *R. 1*, etc., to *R. 1178*, and *Ex. 1*, etc., to *Ex. 42*.

It will be noted that the original certified transcripts furnished by respondents, and the true copies thereof furnished by petitioner, do not contain serially numbered pages as to pleadings. See particularly *Orig. Vol. I*. Accordingly, as a convenience to the court and to the parties, counsel for petitioner has prepared a detailed tabulation (on yellow paper) of the contents of each of the 7 volumes which he has inserted in the frontispiece of each set of *Orig. Vol. I*. A separate copy of the contents of each succeeding volume is inserted in the frontispiece of each of said volumes. It tabulates the contents of each volume by *items*.

Reference to any such document will be indicated as *Orig. Vol. I, item 1*, etc., when no other ready reference is indicated.

IV. Summary of Pleadings

On March 10, 1948, respondent, Hon. Oscar R. Ewing, after notice and hearing at Washington, D. C., signed the *First Final Order* to become effective 90 days thereafter, or on June 11, 1948 (App. A, p. 13, hereof).

On April 29, 1948, petitioner, seeking first to exhaust its administrative remedies, filed a petition with the Administrator for further hearing, reopening, reconsideration, revision, and oral argument concerning the reasonableness and lawfulness of said final order (*Orig. Vol. I, item 2*).

On May 22, 1948, petitioner, having waited as long as possible prior to effective date of order for the Administrator to rule on its petition for further hearing * * * and oral argument of April 29, 1948, and not being advised of any decision thereon, filed with this court a petition for judicial review seeking a temporary and permanent injunction and an order remanding the proceedings to the Administrator to take further evidence with respect to petitioner's method of blanching oysters, which had been newly developed commercially subsequent to the close of the record upon which the Administrator based his First Final Order of March 10, 1948.

On May 25, 1948, respondent Ewing denied the petition for further hearing * * * and oral argument of April 29, 1948 (*Orig. Vol. I, item 1*).

On June 8, 1948, this court issued an order remanding the proceedings to the Administrator, respondent Ewing, to take further evidence, and temporarily stayed the effect of said order.

On July 7 to 12, 1948, a further hearing was held before a Presiding Officer, designated by respondent Ewing (R. 703).

On August 3, 1948, respondent Kingsley, as Acting Administrator, signed the *Second Final Order*, again denying relief sought by petitioner (*Supp. Vol. IV;* also App. B hereof).

On August 19, 1948, petitioner seasonably filed in this court its motion for an order continuing the present stay pending final determination as provided in this court's order of June 8, 1948, and for a permanent injunction, and for an order fixing dates for further proceedings herein.

On September 13, 1948, petitioner filed and served its first and second supplemental petitions herein, naming Acting Administrator Kingsley as an additional respondent, and challenging the validity of both the First Final Order of March 10, 1948, of respondent Ewing, and the Second Final Order of August 3, 1948, of respondent Kingsley.

Petitioner also filed on the same date the requisite copies of the transcript of proceedings before the Administrator.

Various other motions, affidavits and memoranda of authorities have been filed by the parties, but detailed recital thereof is not presently deemed essential.

On September 14, 1948, the matter came before this court on petitioner's motion filed August 19, 1948.

On September 30, 1948, this court entered its order

providing that:

> "enforcement of the final orders of the Administrator * * * are hereby stayed until the final order of this court upon the merits and the law on review to this court."

STATEMENT OF THE CASE

Both final orders were promulgated under §401 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C.A. 341, *infra*). The orders establish *new* definitions and standards of identity and *new* standards of fill for canned oysters. They would increase the drained weight of oyster meats packed by petitioner and other Western producers from a long established standard, and change the accepted name of the food long used by petitioner and other West Coast packers (App. A and B).

From 1906 (when the Federal Food and Drug Act was enacted, *infra*) until 1942 (when the War Production Board imposed certain temporary tin restrictions, *infra*) a series of decisions had required that 5 ounces of drained weight of oyster meat be contained in a standard No. 1 can[4] (Callaway, R. 63).

In 1928, the industry started on the West Coast. A witness for the Food and Drug Administration testified that at that time:

> " * * * the question arose as to what fill should

---

[4]This No. 1 size of can (also termed Picnic, E.O.—for Eastern Oyster, or Campbell's Soup size), is treated as the standard size in these proceedings and will be so referred to herein. The 5 ounce fill is equivalent to a fill of 46 per cent of can capacity. Other sizes of cans are proportionately filled (App. C, Finding 3, p. 27). To translate per cent to ounces, see note, App. A, p. 13, *infra*.

be used, and *after some investigation it was reported that the five-ounce fill was satisfactory* for the Pacific oysters, *and they began to be canned with that fill.*

"At that time both the *Southern* and *Pacific* oysters were using the same fill.

"That * * * continued up until about the beginning of the war when there was a cessation of canning on the Pacific Coast * * * ." (Callaway, R. 63-4)

In 1946 the Western industry resumed canning operations. It again packed the lawful 5 ounce fill applicable to its large sized oysters (Callaway, R. 64).

Petitioner's canned oysters have been continuously marketed since 1931 under the label:

"OYSTERS"

Beneath this descriptive term is the legend:

"PRIDE OF THE PACIFIC"

with the name of petitioner and its address at Seattle, Washington, printed below in clear letters (respondents' Ex. 31).

In practical effect, the two assailed Final Orders would require petitioner (and all other Western packers) to:

(1) *increase* the drained or cut-out weight of oyster meats from the existing 5 ounce standard for the large Western oysters to a new requirement of 6½ ounces; or a 30 per cent increase per can (App. A, p. 12-13); and

(2) *remove* from petitioner's labels (and other Western packers) a long-continued use on the can labels of the generic description "OYSTERS"

providing that:

> "enforcement of the final orders of the Administrator * * * are hereby stayed until the final order of this court upon the merits and the law on review to this court."

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(2) *remove* from petitioner's labels (and other Western packers) a long-continued use on the can labels of the generic description "OYSTERS"

and require thereafter that such labels be changed to "PACIFIC OYSTERS" (App. A, p. 6).

At the same time the two assailed Final Orders would immediately permit Southern packers of an entirely different species of oysters, subject to different conditions of growth and of processing, to:

(1) *lower* the required drained weight of small Southern oysters from the existing 7½ ounce standard, heretofore found reasonable by the Food and Drug Administration for the Southern type of pack, to a new requirement of 6½ ounces; or a 13 per cent reduction per can (App. A, p. 12-13, App. C. p. 31); and

(2) *confer* on Southern packers *a new and exclusive right* to label their products by the generic description:

"OYSTERS"

without any restrictive geographical designation of source or species (App. A,p. 6).

The two Final Orders requiring compliance with both of these concurrent and contrasting *detriments to petitioner* and *benefits to Southern packers* are unlawful in violation of the Federal Food, Drug, and Cosmetic Act and of the Administrative Procedure Act, *infra.*

I. Questions Involved

Whether, as alleged, the two Final Orders are "*not in accordance with law*"[5] because they are:

(a) made "without observance of procedure required by law";

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[5]21 U.S.C.A. (Supp.) 371(f)(3) *infra,* p. 12.

(b) "based on findings of fact which are not supported by substantial evidence."

(c) "in excess of statutory jurisdiction";

(d) "arbitrary, capricious, and an abuse of discretion"; and

(e) "contrary to constitutional rights";[6]

II. Manner in Which Questions Are Raised

The questions are raised by the pleadings filed by petitioner, and by the transcript of proceedings and records filed by respondents upon the basis of which each such respondent has certified that he based his First Final Order and his Second Final Order, respectively.

Respondents have filed certain interlocutory motions and briefs in opposition to motions filed by petitioner for temporary stay orders; but respondents have not filed any answer or other form of pleading challenging either the jurisdiction of this court or answering the merits of the allegations of petitioner's original and supplemental petitions for judicial review.

III. Statutes Involved

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 [21 U.S.C.A. (Supp.) 301, *et seq.*], in parts pertinent to this case, provides:

"Sec. 401 (21 U.S.C.A. 341). *Whenever* in the judgment of the Administrator *such action will promote honesty and fair dealing in the interest of consumers*, he shall promulgate regulations fixing and establishing for any food, *under its common or usual name so far as practicable*, a *rea-*

[6] 5 U.S.C.A. (Supp.) 1009(e) *infra*, p. 17.

sonable definition and standard of identity, a *reasonable* standard of quality, *and/*or *reasonable* standards of fill of container * * * ."

"Sec. 701(e) [21 U.S.C.A. 371(e)]. The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, *shall hold a public hearing* upon a *proposal* to issue, amend, or repeal any regulation contemplated by any of the following sections of this Act: 401 * * * . At the hearing any interested person may be heard in person or by his representatives. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing, amending or repealing the regulation or determining not to take such action. The Administrator shall base his order *only on substantial evidence of record at the hearing* and shall set forth as part of the order detailed findings of fact on which the order is based. * * * "

"Sec. 701(f)(1) [21 U.S.C.A. 371(f)(1)]. In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States * * *."

* * * * * * * * *

"(3) [21 U.S.C.A. 371(f)(3)]. The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If * * * such order is *not in accordance with law* the court shall by its judgment order the Administrator to take action * * * in accordance with law. *The findings of* the Administra-

tor as to the *facts, if supported by substantial evidence, shall be conclusive.*

* * * * * * * * * *

"6 [21 U.S.C.A. 371(f)(6)]. The remedies provided * * * shall be in addition to * * * any other remedies provided by law."

The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237 [5 U.S.C.A. (Supp.) 1001, *et seq.*], in parts pertinent to this case provides:

"DEFINITIONS

"Sec. 2. (21 U.S.C.A. 1001) as used in this Act—

"(a) AGENCY.—'Agency' means each authority * * * of the Government of the United States.

* * * * * * * * *

"(c) RULE AND RULE MAKING.—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * * and includes the approval or prescription for the future of rates * * * or practices * * *. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule.

"(d) ORDER AND ADJUDICATION. — 'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order.

"(e) LICENSE AND LICENSING. — 'License' includes the whole or part of any agency *permit*, certificate, *approval*, registration, charter, mem-

bership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

* * * * * * * * * *

"(g) AGENCY PROCEEDING AND ACTION.—'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

"RULE MAKING

"Sec. 4. (21 U.S.C.A. 1003)

* * * * * * * * * *

"(b) PROCEDURES.— * * *. *Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of section 7 and 8 shall apply* in place of the provisions of this subsection."

"ADJUDICATION

"Sec. 5. (21 U.S.C.A. 1004). *In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,* * * *.

"(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. * * *, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to

participate; * * * . *No officer, employee, or agent engaged in the performance of investigative or prosecuting functions* for any agency in any case *shall*, in that or a factually related case, *participate or advise in the decision*, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. *This subsection shall not* apply in determining applications for initial licenses or to proceedings involving * * * rates, facilities, or practices of public utilities or carriers; nor shall it *be applicable in any manner to the agency or any member or members of the body comprising the agency.*"

"HEARINGS

"Sec. 7. (21 U.S.C.A. 1006). *In hearings* which section 4 or 5 requires to be conducted pursuant to this section—

* * * * * * * * * *

"(c) EVIDENCE.—Except as statutes otherwise provide, *the proponent of a rule or order shall have the burden of proof.* Any oral or documentary evidence may be received, but *every agency shall* as a matter of policy *provide for* the *exclusion of irrelevant, * * * evidence and no* sanction shall be imposed or *rule or order be issued except upon consideration of the whole record * * * and* as *supported by* and in accordance with the *reliable, probative, and substantial evidence.* Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

* * * * * * * * * *

"(d) RECORD.—The transcript of testimony

and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 * * * . *Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall* on timely request *be afforded an opportunity to show the contrary.*"

"DECISIONS

"Sec. 8. (21 U.S.C.A. 1007). In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, *the officer who presided* (*or*, in cases not subject to subsection (c) of section 5, *any other officer* or officers *qualified* to preside at hearings pursuant to section 7) *shall initially decide the case or the agency shall require* * * * *the entire record to be certified to it for initial decision.*

"(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review * * * *the parties shall be afforded* a reasonable *opportunity to submit* for the consideration of the officers participating in such decisions (1) *proposed findings and conclusions*, * * * *and* (3) *supporting reasons* for such * * * proposed findings or conclusions. *The record shall show the ruling upon each such finding* (or), *conclusion* * * * presented. *All decisions* * * * *shall* * * * *include a statement of* (1) *findings* and conclusions, *as well as the reasons* or basis therefore, *upon all* the *material issues of fact, law, or discretion* presented on the record; * * * ."

"JUDICAL REVIEW

"Sec. 10. (21 U.S.C.A. 1009)

* * * * * * * * * *

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * * * * * * *

"(e) SCOPE OF REVIEW.—*So far as necessary to decision* and where presented *the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall* * * * (B) *hold unlawful and set aside* agency action, *findings, and conclusions found to be* (1) *arbitrary, capricious, an abuse of discretion,* or otherwise not in accordance with law; (2) *contrary to constitutional right,* power, privilege, or immunity; (3) *in excess of statutory jurisdiction,* authority, or limitations, or short of statutory right; (4) *without observance of procedure required by law;* (5) *unsupported by substantial evidence* in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; * * * . *In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party,* and due account shall be taken of the rule of prejudicial error."

HISTORICAL NARRATIVE OF FACTS

Oysters have been canned commercially for the past fifty years. The industry was located on the Gulf and South Atlantic Coasts until 1928 when it also developed on the West Coast (Callaway, R. 31). During all of these years until 1944 the standard of fill for canned oysters remained unchanged (App. D).

In 1906 Congress enacted the Food and Drug Act of June 30, 1906, c. 3915, 34 Stat. 768 (21 U.S.C.A. 1, *et seq.*). Administration of this Act was vested in the Department of Agriculture, *29 Op. Atty. Gen. 494 (1912)*. This Act, as from time to time amended,[7] continued in effect until 1938, when, contemporaneous with the enactment of the Federal Food, Drug, and Cosmetic Act, *supra*, the former act was superseded. The new act now vests jurisdiction in the Federal Security Administrator [21 U.S.C.A. (Supp.) §321 (d)].

I. History of Federal Requirements for "Fill of Container" of Canned Oysters

During the years from 1906 to 1944, respondents and their predecessor, the Department of Agriculture,

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[7]The McNary-Mapes Amendment of July 8, 1930, c. 874, 46 Stat. 1019, expressly amended §10 of the Food and Drug act to authorize establishment of reasonable standards of quality, condition and fill for canned foods. See *Nolan v. Morgan*, 69 F.(2d) 471 (C.C.A. 7, 1934) aff'g., 3 F. Supp. 143. Theretofore standards of fill of container had been established pursuant to then existing Food and Drug Act prohibitions against adulteration and misbranding of products which were subject to criminal and forfeiture proceedings. 21 U.S.C.A. 1, *et seq.*

issued several regulations having to do with the required fill of canned oysters and related products. The full text of each of these decisions is set forth in Appendix D, and are summarized below.

In 1912 it issued Food Inspection Decision No. 144. It stated that the can:

> "* * * should be *as full of food as is practicable* for packing and processing *without injuring the quality* or *appearance* of the contents."

It then pointed out that in some foods, as for example, canned tomatoes, the addition of water is deemed adulteration, but that:

> "*Other foods may require the* addition of water, (or) *brine*, * * * either to combine with the food *for* its *proper preparation or* for the purpose of *sterilization* * * *."

It then gave as an example, peas, which, it found, should contain only sufficient liquor to fill the interstices and cover that product. It then ruled that:

> "*Canned foods* * * * *will be deemed* * * * *adulterated if they* are found to *contain* water, (or) *brine* * * * *in excess of the amount necessary for* their proper *preparation* and *sterilization.*" (App. D, p. 35)

On February 19, 1914, the Department promulgated two regulatory opinions, Nos. 2 and 3, which fixed, respectively, the amount of drained weight of clam meat, and of oyster meat, required in various sizes of canned clams and canned oysters.

Opinion No. 2 referred to Food Inspection Decision No. 144, *supra*, recited inquiries received from packers of canned clams as to the weight which cans should

contain in order to comply with the requirements of the above decision, recited an investigation by its Bureau of Chemistry, and found:

> "As a result of this investigation * * * that cans which contain (*a weight of 5 ounces* in the No. 1 regular or oyster can and proportional weights in other cans) of drained clam meat * * * *will satisfactorily fulfill the requirements of Food Inspection Decision No. 144.*" (App. D, p. 37)

On the same date, February 19, 1914, the Department issued Opinion No. 3, which recited that:

> " * * * pending further investigation the *weights* (*of oyster meats*) agreed upon by the canners (*of 5 ounces* in the No. 1 can, and proportional weights in other cans) * * * *will be regarded * * * as satisfactorily fulfilling the requirements of Food Inspection Decision No. 144.*" (App. D, p. 38)

Thus in 1914 drained weights were established for all canned oysters, identical with those found reasonable for canned clams, on the basis of the 5 ounce fill.[8]

On October 21, 1914, the Department issued Opinion No. 88, which confirmed its earlier determination of a 5 ounce drained weight prescribed in Opinions Nos. 2 and 3, and further provided that:

> " * * * *the quantity* * * * of a package of *canned* (*cove*) *oysters* or canned clams, as usually packed and processed, *should be declared on the basis of* the 'cut-out' *weight of the drained meat.*" (App. D, p. 38)

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[8]The can sizes vary but as to the No. 1 regular can and as to the No. 2 regular can, drained weights of 5 ounces and 10 ounces, respectively, were prescribed, and the others were proportionate (App. D, p. 37).

This required the can to be labelled in effect "Drained Weight—5 ounces." It was repealed in 1923. See Opinion No. 379, below.

On August 18, 1915, it promulgated Opinion No. 134 which outlined the procedure for draining in order to determine the cut-out or drained weight of canned clams and canned oysters (App. D, p. 39).

On February 14, 1923, it revoked Opinion No. 88 by its Opinion No. 379, stating:

> "*Because the liquid packing medium in* canned clams and *canned oysters has a certain food value and is ordinarily utilized as food, no objection will be made to marking the net weight* of these products in terms of total weight, *liquid included.*" (App. D, p. 40)

It then reaffirmed the findings in Opinions Nos. 2 and 3, *supra*, that the drained or cut-out weights of clam meats and of oyster meats should be 5 ounces in the No. 1 can (App. D, p. 40). This restored permission to show "Net Weight," 5 ounces of which were required to be oyster meat and the balance a packing medium "*of certain food value and * * * ordinarily utilized as food.*"

The 5 ounce drained weight was adopted by all canners of canned oysters (Rowe, R. 94). These orders continued in effect unchanged in any respect by the Department of Agriculture, the Food and Drug Administration, or the Federal Security Agency, during the years from the various dates that they were promulgated until 1944, as to Southern oysters, and 1947-8, as to Western oysters (App. C, A and B).

However, in the latter part of 1942, the War Production Board issued Conservation Order M-81 to conserve the wartime use of tin plate.[8a] It provided, among other things, that canned oysters be packed only in certain sizes of cans, the smallest of which was the standard No. 1 can, and that if packed, the No. 1 can must contain not less than 7½ ounces of drained weight (Carriere, R. 448).

The Southern industry had already complied with a similar War Production Board requirement in increasing the drained weight contents of its pack of Southern canned shrimp to 7½ ounces, and it likewise agreed to adopt the required wartime 7½ ounce fill for canned oysters (Holcombe, R. 550). It was their definite understanding that the heavy fill would not continue indefinitely but that they "would revert back to the pre-war fill (5 ounces) after the conflict was over" (Holcombe, R. 550; Carriere, R. 448-9; Callaway, R. 65).

The Western industry did not adopt the War Production Board measure and hence did not obtain tin for canning oysters during the war years while the war conservation order was in effect (Bendiksen, R. 443). During that period they sold their products chiefly in the fresh market (Clough, R. 204). The Western industry resumed packing of canned oysters in April, 1946, at the lawful pre-war weight of 5 ounces for the No. 1 can (Bendiksen, R. 443-4; Callaway, R. 64).

[8a]7 F.R. 947, 4836, and successive amendments. See 32 C.F.R. (Cum. Supp.) p. 9318.

But, after War Production Board Conservation Order M-81 had become effective in 1942, the Food and Drug Administration announced that it would hold a hearing on the fill of containers for canned oysters in Washington, D. C., on August 22, 1944 (Carriere, R. 450).

The Pacific Coast canners entered an appearance. No oysters were being canned on the Pacific Coast, and there was no evidence with respect to Pacific oysters (Callaway, R. 66-7).

The Southern industry did not appear at that hearing "because it occurred during the period of peak production" in the shrimp pack, and because there remained "the problem of tin conservation" (Carriere, R. 450-1; Sewell, R. 545).

Mr. Callaway, a witness for the Food and Drug Administration, stated in the 1947 hearing:

> "A hearing was held (in 1944), at which *I testified. The present standard fill* of container *was adopted on the basis of that evidence.*" (Callaway, R. 15)

Exhibit 3 is the "present standard fill" to which Mr. Callaway referred. It established in 1944 a 7½ ounce fill for the small Southern oysters. That order is reproduced herein as Appendix C.[9]

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[9]The order of March 10, 1948 (App. A, p. 7, finding 2) identifies this order as "an order effective February 23, 1945." These dates are reconciled because Exhibit 3, or Appendix C, was published in the Federal Register November 25, 1944, 9 F.R. 14008-9, and by its closing paragraph provided that it should become effective on the 90th day following the date of publication, *i.e.*, February 23, 1945.

It first recites (with some modifications of language and intent) the effect of some of the prior orders of the Secretary of Agriculture (App. C, findings 1 and 2; compare texts quoted in Appendix D).

This 1944 order (App. C) stated in finding 4 that when cans of oysters were filled to the 5 ounce fill, in compliance with the then outstanding orders of the Secretary of Agriculture:

> " * * * the cans contain a smaller quantity of oysters than consumers expect from the size of the container."[10] (App. C, finding 4)

The 1944 order contained, in part, the following findings which summarize much of the background of this proceeding:

> "5. Prior to 1928 all oyster canneries in this country were located along the Atlantic Coast and the Gulf Coast. In 1928 oyster canning was begun on the Pacific Coast. *At present oyster canneries are* situated *principally on the South Atlantic and Gulf Coasts and* the *Northwest Pacific Coast.*
>
> "6. *The oysters canned on the Atlantic* Coast *and Gulf Coast are* for practical purposes *the same type but those canned on the Pacific Coast are of different species,* and are *considerably larger* in size.
>
> "7. *After* the *shell oysters are delivered to the cannery* * * * (they) *are* * * * *steamed* * * * .

[10]The only cans in evidence were of Southern oysters. Moreover, as recently as July 10, 1947, Mr. Callaway testified that "during all of these years" he did not "recall any definite" complaints by consumers as to the 5 ounce fill of container of canned oysters (Callaway, R. 64).

After steaming they are * * * *filled* into the cans * * *. * * * *with a predetermined weight* of oysters, *brine or water and a salt tablet are added*, and the cans are *sealed* by machine *and* then *processed by heat* to prevent spoilage of the product.

"8. The *steaming causes the shells to open* * * * *at the same time the oyster meat loses liquid and shrinks in both size and weight.* Until the maximum shrinkage is reached, *increased time or temperature* of steaming *increases the shrinkage.* The *time and temperature* * * * *varies* * * * *depending on* a number of factors such as the *amount of shrinkage the canner desires and* the *difference of composition* of the oysters.

"9. In general, *Pacific Coast canneries do not steam to the same extent as Atlantic and Gulf canneries. In Atlantic and Gulf packed oysters there is* usually *a slight gain in weight during processing* in the can, *whereas in Pacific packed oysters* a considerable part of the total shrinkage takes place in the processing with a consequent loss of weight.

"10. *Considerable experimental work* has been done in recent years by the Food and Drug Administration *on Atlantic Coast and Gulf Coast canned oysters* for the purpose of establishing a fill of container standard. *Very little experimental work* has been done by the Administration *on Pacific Coast canned oysters*, the principal reason being that none have been packed there since 1942.

"11. *It is entirely practicable* under existing cannery practices *for canneries on the Atlantic Coast and Gulf Coast to pack oysters so that the drained weight* of oysters taken from each can

will be at least *68% of the water capacity* of the container. *Such a fill can be met in commercial practice without unreasonable difficulty and without damage to the product.* * * *

"12. *Pacific Coast canners have* not packed oysters commercially since 1942. * * * *It has been the practice* of Pacific Coast oyster canners *to pack the No. 1 can to give a drained weight of 5 ounces* * * *. There are usually from 4 to 8 oysters* in the No. 1 can * * * *to give the 5-ounce drained weight.* * * *The average drained weight per oyster of Pacific Coast canned oysters is at least* ½ *ounce and is usually more.*

"13. *Atlantic Coast and Gulf Coast canned oysters vary in* size, their *drained weight averaging* from about *4 oysters per ounce* to about *13 oysters per ounce.*

* * * * * * * * * *

"CONCLUSIONS

"1. *There is insufficient evidence* in this record to warrant the findings of fact on which *to base a standard of fill* of container *when drained weight of oysters* in a particular can *averages* ½ *ounce or more per oyster.*

" * * * the following regulation is hereby promulgated:

"§36.6 * * * (a) *The standard of fill* of container for canned oysters *when the drained weight* * * * after processing *averages less than* ½ * * * *ounce* per oyster *is* * * * not less than *68 per cent* of the water capacity * * * .

"(b) * * * *canned oysters means oysters packed into containers* which are then sealed and processed by heat to prevent spoilage.

" * * * * * * * * * * "

The Southern oyster industry did not challenge the validity of this 1944 order, and the Western packers could not challenge it, although they alone had protested, because they were not "adversely affected" within the jurisdictional requirements of Section 701(f)(1) of the Food, Drug, and Cosmetic Act, *supra.*

In 1946, petitioner and other Pacific Coast canners resumed canning on the 5 ounce drained weight (Callaway, R. 64). This was the lawful standard applicable to the large Pacific oysters pursuant to the above 1944 order (App. C).

A witness for the Food and Drug Administration testified a year or more later on July 10, 1947, that "violent complaints" were received by the Food and Drug Administration from the Southern industry who were packing to the 7½ ounce fill (Callaway, R. 64; Ex. 4). The Southern industry had voluntarily packed at that fill under the War Production Board Order M-81 (Holcombe, R. 550), and that same 7½ ounce fill had been carried forward as to the small Southern oysters by the Food and Drug Administration order of November 18, 1944 (App. C).

But, the first advice that petitioner and others in the Western industry received was by a notice published in the Federal Register in February 1947 (Ex. 8). It stated in part:

> "* * * *Regulations* * * * *promulgated on November 25, 1944* * * * *require* (s) * * * when the drained weight * * * averages less than ½ ounce per oyster, * * * (that) not less than 68 per cent of the * * * capacity of the can * * *

(be) packed. For the No. 1 can * * * *a drained weight of about 7.5 ounces* of oysters is required.

"At the hearing (in August 1944) * * * there was insufficient evidence * * * to base a standard of fill * * * when the drained weight * * * averages ½ ounce or more per oyster. * * *

"* * * some packers of canned oysters are now putting up *large oysters*, not subject to the * * * standard, so that the drained weight * * * is 5 ounces * * *. Although such canned oysters *are not subject to the* * * * fill of container *standard* they are subject to the * * * Food, Drug, and Cosmetic Act. *Section 402(b)(2)* * * * states that a food shall be deemed to be adulterated if any substance has been substituted * * *. *Section 403(d)* * * * provides that a food shall be deemed to be misbranded if its container is * * * misleading. It is our opinion that these sections *apply* to canned oysters *if* water, *brine, or liquid draining from oysters during processing, replaces* a quantity of *oysters which should be added to fill the can.*

"*It is the intention* of this Agency to *call a hearing * * * to adopt definitions and standards of identity and * * * fill* of container for all canned oysters. *In the meantime the Food and Drug Administration will apply the substantive provisions of the Act* to canned oysters where the container is not as full of oysters as is practicable without injury to the quality or appearance of the product."

This notice by its terms would appear to indicate that petitioner and others on the Pacific Coast were in some manner violating the Act, although they had resumed after the war with the knowledge of the

Food and Drug Administration (Callaway, R. 64), and were adhering to the lawful 5 ounce drained weight that had been standardized since 1914 (App. D, pp. 35-40).

However, although this notice suggested that the existing standards of fill might be *increased*, the Commissioner of the Food and Drug Administration on May 22, 1947, notified his Chiefs of the Food and Drug District Offices throughout the country, that application had been received to *reduce* the required drained weights (Ex. 6). It states in part:

> "As you know, *applications have been received* from a substantial portion of the canned oyster and canned shrimp industries *asking* that *hearings* be called *on proposals* * * * *to lower the required drained weights.* In the case of canned oysters the Administrator has also issued a notice (Federal Register of February 7, 1947), stating * * * his intention to call a hearing on a proposal to amend that part of the fill of container standard limiting its application to canned oysters * * * of * * * less than ½ ounce. * * * hearings will be called in Washington early in July on proposals to amend both standards. *Probably a session of the canned oyster hearing will be held later on the Pacific coast.*
>
> * * * * * * * * * *
>
> "* * * *The applications for changes in* the fill of container standard for both canned *oysters and* canned *shrimp state that* the *quality* of both foods *is injured* by the fills now required. * * *"

On June 6, 1947, a notice of hearing to commence July 10, 1947, at Washington, D. C., was published in the Federal Register (Ex. 1). It did not advise of

any precise "*proposal*" to change the standard of fill, either by increasing or lowering the then existing standards of 5 ounces for large oysters and of 7½ ounces for small oysters, but left that figure blank "to be fixed on the basis of evidence taken at the hearing" [Ex. 1, p. ii, §36.6(a)].

The foregoing summarizes the facts which transpired with respect to the standard of fill of container prior to the 1947-1948 hearings.

II. History of "Common or Usual Name" of Canned Oysters

The *first* reference to the "common or usual name" of canned oysters is contained in Opinion No. 88, issued October 21, 1914 (App. D, p. 88). It identifies all canned oysters uniformly by the single term:

"CANNED (COVE) OYSTERS".

At that time, all canned oysters were produced on the Atlantic and Gulf Coast (App. C, p. 27).

The *second* reference to "common or usual name" is contained in the November 18, 1944, decision of the Federal Security Administrator (App. C). It is captioned in part:

"Definitions and Standards of Identity."

Finding No. 6 states in full text:

> "6. The oysters *canned* on the *Atlantic* Coast *and Gulf* Coast *are* for practical purposes *the same type* but those canned on the Pacific Coast are of different species, and are considerably larger in size."

In Findings 12 and 13, the 1944 order (App. C, p. 29)

distinguishes between oysters on the basis of size, finding that Pacific Coast oysters are usually ½ ounce or more in drained weight, and that Atlantic and Gulf Coast oysters average from ¼ ounce to about 1/13th ounce in drained weight.

The *third* reference to "common or usual name" is contained in the 1944 order. Its *Conclusion* portion promulgates the following regulation:

> "§36.6(b) For the purposes of this section *canned oysters means oysters* packaged into containers which are then sealed and processed by heat to prevent spoilage." (App. C, p. 31)

Petitioner's canned oysters have been continuously so labelled as "OYSTERS" without geographical restriction for 16 years (Ex. 31, R. 755).

No further reference to "common or usual name" was made until the 1947-1948 hearings (Ex. 1).

III. Summary of Evidence and Record[11] Considered by the Administrator in Issuing His First Final Order of March 10, 1948; and That Considered by the Acting Administrator in Issuing His Second Final Order of August 3, 1948.

The *oral* evidence[11] in this case, at the two successive hearings, comprises 1178 pages of testimony of 19 witnesses. Of these, 7 are officials of the Food and Drug Administration, Messrs. Allen, Callaway, Hansen, Lovejoy, Nicholson, Rowe, and Steagall; 7 testified on behalf of the Western oyster industry, Messrs.

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[11]For record references to testimony of each witness and of exhibits see Table of Witnesses and Exhibits before Administrator, *supra.*

Bailey, Barnett, Bendiksen, Clough, Esveldt, Kincaid, and Wiegardt; and 5 are officers of the Southern oyster industry, Messrs. Carriere, Holcombe, Jastremski, Sewell and Strasburger.

The *documentary* evidence offered by the parties consists of 42 exhibits comprising more than 200 pages, of which 21 were offered by the Administrator, 20 by the Western industry, and 1 by the Southern industry; and of various pleadings of the parties.

For summary purposes, the evidence and record may be briefly reviewed in chronological divisions, set forth in the sequence of proof:

(A) Evidence offered at July, 1947, hearings

(1) By the Administrator:

Oral evidence was offered through 3 witnesses, Messrs. Callaway, Rowe, and Allen. It contains the historical background; the nature of oyster canning operations in the Southern states of Louisiana and Mississippi and in the Western states of Washington, Oregon, and California; complaints from the Southern oyster industry that Western oysters, although of a different species and packed under different methods, should contain an identical drained weight regardless of such difference of characteristics; testimony concerning certain experimental packs put up by Food and Drug employees, alleged to show that the Western oyster could be packed to yield a drained weight of 7½ ounces (Callaway, R. 13-91; Rowe, R. 92-128; Allen, R. 128-139); testimony by its principal witness that the drained weight should be reduced from the 7½ ounce fill previously recommended (R.

15) and found reasonable for Southern oysters (Ex. 3), to a new drained weight of 7 ounces to apply to both industries (Callaway, R. 38); and opinion testimony based on reports made to Food and Drug inspectors as to the viewpoint of buyers (Exs. 5, 7).

The *documentary* evidence consisted of 13 exhibits, 4 of which were formal copies of official notices, Ex. 1, 2, 3, and 8; 2 were interoffice communications within the Food and Drug Administration, Exs. 4 and 6; and 7 others as follows:

Ex. 5 consists of 14 numbered pages, followed by a price chart, and of 30 unnumbered pages. It contains reports of Food and Drug inspectors of interviews made responsive to instructions contained in the interoffice communication, *Ex. 4*. Neither the name nor address of any individual reported to have been interviewed is shown in any way. He is represented in each instance only by a coded alphabetical letter without identification (See Ex. 5).

Ex. 7 contains similar reports of Food and Drug inspectors made responsive to similar instructions, *Ex. 6*. It consists of 38 pages. It differs from *Ex. 5* in that the names and addresses are shown, but it also differs in that it constantly refers to two different subjects, the fill of container of canned shrimp and of canned oysters, with greater emphasis on canned shrimp. On direct examination Mr. Callaway had testified from his observations and from these reports (Exs. 5 and 7) that:

> "so far as canned oysters are concerned no one had noted any injury to quality of canned oysters due to the increased fill" (R. 30).

However, on cross-examination Mr. Callaway, who offered these exhibits, stated that it is difficult to tell whether they refer to canned shrimp or canned oysters:

> *"It was so difficult I thought it best to copy them * * * . * * * As a matter of fact, if I had realized it, I think I would have had the reports kept separate because * * * it is sometimes difficult to tell how much of what they are saying applies to oysters."* (Callaway, R. 43-4)

It was impossible for petitioner and others to meet or challenge such hearsay statements. However, the Administrator, in his First Final Order, relies on these same Exs. 5 and 7 and on Mr. Callaway's direct testimony, and on his own interoffice communications, Ex. 4 and 6, as supporting his two respective findings No. 5 under the "Identity" and "Container" sections of his order (App. A, pp. 4, 9).

Respondents' Exs. 9, 10, 11, 12, and 21, are statistical container studies made by inspectors of the Food and Drug Administration, alleged to show the possibility of packing Western oysters to the 7 ounce fill. These were made by hand-picking oysters in a slow, studied manner that could not be used commercially (Barnett, R. 415).

(2) By the Western oyster industry:

Oral evidence was offered by 7 witnesses, Messrs. Wiegardt, Kincaid, Esveldt, Clough, Barnett, Bendiksen, and Bailey. They testified generally to the completely different biological nature of the Western and Southern oysters; the Western oyster's particular exclusive suitability for frying; the high food value of

its nectar; its high customer acceptance under existing 5 ounce drained weight requirements; and the rapid deterioration in quality due to discoloration, twisting, breakage, and pressure blemishes if subjected to excessive drained weight requirements in excess of 5 ounces. (Wiegardt, R. 150-153; Kincaid, R. 154-190; Clough, R. 196-279; Bailey, R. 522-534).

The *documentary* evidence of the Western industry consisted of 8 exhibits: Ex. 13, contains photographs to illustrate the Western or Pacific (*ostrea gigas*) oyster. Ex. 18 is a letter from a consumer protesting against inferior quality in a heavier pack. Exs. 14, 15, 16, 17 and 20, consist of 78 pages of detailed statistical cutting data and underlying work sheets reporting on extensive experiments, which confirmed oral testimony that drained weight fills of Western oysters in excess of 5 ounces, result in great deterioration in quality because of discoloration, twisting, breaking, and pressure marks which blemish the oysters. This deterioration increases rapidly as the drained weight content is raised above 5 ounces. It is graphically summarized in the charts (Exs. 14-D, 15-C and 16-D).

(3) By the Southern oyster industry:

Only *oral* evidence was offered. Five witnesses, Messrs. Carriere, Jastremski, Sewell, Holcombe, and Strasburger testified generally to the problem of the Southern industry since 1942, when they agreed to comply with the 7½ ounce limitation of the Tin Conservation Order; that compliance had greatly impaired quality, resulting in a compressed ball, matted like dog food; the past high consumer acceptance that

had been enjoyed by the 5 ounce drained weight fresh-opened, pre-cooked or blanched Southern oysters during a marketing period from 1936 to 1942 under a 5 ounce drained weight; that it had abandoned fresh-opened or blanched Southern oysters because it was impossible to put more blanched oysters into a can than to yield a 5 ounce drained weight, and hence that it was not possible to continue this superior pack under the 1944 order (Carriere, R. 453-5; Holcombe, R. 554-5, and Callaway, R. 46).

No *documentary* exhibits or container studies were offered by the Southern industry in support of their "proposal" or "application" for reduced drained weights of their products (Ex. 6).

(B) Additional pleadings and papers submitted to Administrator re First Final Order.

The Administrator's certification of the record contains 17 other documents (*Orig. Vol. I, items 1 to 17*). They are arranged by him in inverse chronological sequence and include: item 17, notice of hearing; item 15, tentative order dated October 4, 1947; items 11 and 12, exceptions on behalf of petitioner and others to tentative order; items 8 and 10, petitions for additional hearings to be held on the West Coast; item 7, brief of Mr. Hugh B. Mitchell requesting a postponement and reconsideration of tentative order; Items 4, 5, and 6, orders of Administrator and letter of Administrator, all dated March 10, 1948, denying most of the exceptions, and denying Mr. Mitchell's request

for postponement and reconsideration,[11a] and item 3, the First Final Order dated March 10, 1948 (herein reproduced as App. A), which by its terms was to become effective 90 days thereafter, or on June 11, 1948 (App. A, p. 13).

The Administrator certified that he signed the First Final Order of March 10, 1948 on the basis of this evidence and these pleadings (*Orig. Vol. II, item 1*).

On April 29, 1948, prior to the effective date of said order, petitioner filed its petition for further consideration, reopening, reconsideration, revision and oral argument (*Orig. Vol. I, item 2*). This was denied by the Administrator's letter dated May 25, 1948 (*Orig. Vol. I, item 1*).

(C) This Court's order of remand

On May 22, 1948, petitioner filed its petition for judicial review and other relief. This court, after hearing and consideration of pleadings and affidavits, issued its order of June 8, 1948, remanding the proceedings to the Administrator to take further evidence with respect to petitioner's new method of blanching oysters.

(D) Evidence offered at July, 1948, hearings

At the opening of the further hearing the Administrator's Presiding Officer stated that the hearing was called pursuant to this court's decree to take further evidence relating to:

[11a]The record does not disclose action denying petitions for additional hearings to be held on the West Coast. Suffice it to say, the Administrator refused to hold such hearings.

> "* * * an alleged new method of preparing oysters for canning by blanching fresh-shucked oysters and as to the proper standards of fill of container for oysters canned after such preparation, *which alleged new method is proposed* by Willapoint Oysters, Inc., in connection with the definitions and standards of identity and standards of fill of container for canned oysters." (Goding, R. 703).

The Presiding Officer then stated:

> "Evidence will first be taken from Willapoint Oysters, Inc., *proponent* of the alleged new method of packing blanched oysters, and as to the relationship of such method to a reasonable standard of fill of container for canned oysters.
>
> "Following such evidence, evidence in rebuttal thereof will be received."

Counsel for petitioner reserved on the record the question of whether petitioner was "proponent of a rule or order" within the meaning of the Administrative Procedure Act,[12] but stated that in any event petitioner was prepared to go forward (R. 703-5).

Proof was confined to the new method of blanching oysters (Goding, R. 705; Bailey, R. 725), and did not relate to other matters in which the petition for judicial review had challenged the validity of the First Final Order.

The following summary of evidence is similarly arranged in sequence of proof.

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[12]55 U.S.C.A. (Supp.) 1006(c), provides in part: the "proponent of a rule or order shall have the burden of proof." This will be discussed in the Argument section, *infra*, pp. 113-116.

(1) By petitioner, Willapoint Oysters, Inc., and others of the Western canned oyster industry:

The *oral* evidence consisted of testimony by Mr. Bailey (R. 713-49). It showed generally the history of the development of the new blanching process; that it was first adopted for commercial use on September 22, 1947; that since adopting it petitioner has packed over 2 million cans; that petitioner presently accounts for more than 50 per cent of the total commercial output of all types of canned oysters in the Pacific Northwest; that as a result of the new blanching process the color of the meat is improved over the steam-opened oyster, the liquid being as clear as the steam-opened oyster, the shape retained without deformation, and the flavor greatly improved over the steamed oysters; that "it more nearly resembles the fresh oyster than any canned oyster ever packed in history on either coast" (Bailey, R. 717); that the Southern pre-steaming process results in a great dehydration, whereas the blanching process may be used on either the Pacific or Gulf Coast oysters and retains its high quality of flavor because all but 2 or 3 per cent of the natural body content of the oyster after blanching is retained in the canned oyster (Bailey, R. 719); that in pre-steaming the effect is to drive out of the oyster its natural body juices which contain much of the flavor, vitamins and mineral content of the oyster; that there have been many favorable consumer comments on the better flavor of the blanched product, and has not been a single consumer complaint; that the Southern industry had previously testified they enjoyed similar consumer

acceptance when they had canned their raw-shucked oysters at 5 ounce drained weight, prior to forced abandonment due to Tin Conservation Order, because it was impossible to pack fresh-opened Southern oysters in excess of 5 ounces (R. 722); that the advantage of the blanching process is to retain the natural elements of the oyster as nearly as possible in the can, comparable to retaining the juice in the fresh orange, as contrasted with dried or dehydrated orange pulp (R. 725); that its Western blanched oysters are not sold generally in the same trade channel as canned Gulf or Cove oysters, because 70 per cent of the Gulf pack is sold in the East and Middle West, whereas 70 per cent of the blanched oyster pack is sold in the three Pacific Coast states, and 98 per cent of the entire Western pack is sold west of the Mississippi River, with only 2 per cent being sold in the highly settled eastern part of the United States (Bailey, R. 726); that it is his honest judgment that the First Final Order of the Administrator would *not* support honesty and fair dealing in the interest of consumers, but would result in a highly disadvantageous canned oyster product which would ignore flavor, resemblance to the natural product, and quality, and would be comparable to prohibiting the canning of fresh peas because of their liquid content as compared with dried peas (Bailey, R. 730); and that experience has shown repeatedly that it is impossible to can blanched oysters so as to comply with the increased standard of fill without a substantial impairment of quality due to increased browning, deformities, and pressure (R. 731); that he has been

in the oyster business for 17 years and has tried to live up to the highest ethical requirements of the business and to all of the applicable standards of the Federal Food, Drug, and Cosmetic Act, and that he sincerely believes that the best interests of consumers would be advanced by authorizing both Western and Southern packers to can blanched oysters at a uniform standard of 5 ounce drained weight (R. 748).

The *documentary* evidence offered by petitioner consisted of 8 exhibits, all of which were in affidavit form.

Ex 25 outlines the method of preparing blanched oysters and detailed the facilities granted Inspector Hansen of the Food and Drug Administration to put up a test pack of canned "blanched" oysters, and states the disposition of that pack.

Ex. 26 relates to the further disposition of that pack and as to the method of packing certain designated brands of oysters.

Ex. 27 is the affiidavit of Dr. Ray W. Clough who had previously orally testified at the June 1947 hearings. It shows analyses of the deterioration found in oysters packed by Inspector Hansen (Exs. 25, 26) to meet an increased fill. To this affidavit are appended two brief corroborating affidavits by other participants in Dr. Clough's detailed experimental studies.

Ex. 28 is a detailed report by Dr. David B. Charlton, reporting on a food value comparison made of Western oysters packed by the blanching process, and by the pre-steaming process, and of Southern packs of Cove oysters; together with the reports on a taste

quality Consumer Acceptance Test appraising the comparative consumer reaction to these three different types of canned oysters. The participants in this test were well qualified and impartial women, 2 of whom are specialists in domestic science and 1 a typical housewife. They were not known to petitioner or any of its associates. Their appraisal was based on preparation of oyster stew and of fried oysters by standard recipes. Each brand was graded as to appearance, texture, and flavor, both of the oyster and of the broth. Comments both favorable and unfavorable were made as to each brand, the identity of which was known to the women participants only by number. No. 2, Willapoint, was unanimously chosen as the best of the 3 brands (App. E, pp. 42 to 44; 47 to 50).

Ex. 29 is the affidavit of Laucks Laboratories, Inc., as to the chemical content of oysters. It shows the high protein and solid content in the liquid of Willapoint oysters as contrasted with Surf Maid Southern oysters (App. E, pp. 51-52).

Ex. 30 is the supplemental affidavit of Dr. Charlton reporting on a chemical analysis of Willapoint canned oysters, Code No. 115L (App. E, p. 31). These oysters are shown to have been packed by the blanching method (App. E, p. 42; Ex. 25, p. 2). It further shows that the liquid portion of these blanched Willapoint oysters has a significant food value quite comparable to the entire contents of other well known canned foods, including canned green and wax beans, canned peas, canned clam bouillon, and canned Campbell's beef broth bouillon (App. E, p. 53).

These last 3 exhibits, Nos. 28, 29 and 30, were virtually ignored by the Acting Administrator in his Second Final Order, and are for convenience reproduced in full text herein as Appendix E.

An additional eight exhibits, Nos. 37 to 44, were affidavits proffered by counsel for other West Coast packers. Exs. 37 and 38 show the difficulty of packing experienced by them in efforts to comply with the 6½ ounce fill required by the First Final Order of March 10, 1948. They are supported by photographs illustrating the scattering of salt tablets and littering of the floor with pieces of oysters and protrusion of oysters above the seal of the can before being sealed. Exs. 39 to 44, except No. 42 were affidavits offered in evidence on behalf of these other Western packers but refused admission. Ex. 42 is the affidavit of a woman oyster packer in the plant of one of these West Coast packers counteracting certain oral testimony offered by Mr. Hansen of the Food and Drug Administration (R. 866). The rejected exhibits are set out as Appendix F, *infra.*

(2) By the Acting Administrator:

The *oral* evidence consisted of testimony, principally by two witnesses for the Food and Drug Administration, Messrs. Callaway and Hansen, and of four minor witnesses who gave very brief corroborative testimony. They testified generally in opposition to modifying the prior findings, *supra*, n. 11.

The *documentary* evidence by the Administrator consisted of 8 exhibits, one of which, *Ex. 22*, is the formal announcement of the further hearing; two,

Exs. 23 and 24, are single page affidavits by very small western producers (R. 1052-3, 1058); one, *Ex. 31*, is the label used by petitioner, Willapoint Oysters, Inc., showing the term "OYSTERS" and "NET DRAINED WT. 5 OZ. OYSTER MEAT"; one, *Ex. 32*, consists of a group of photographs of opened cans of oysters; two, *Exs. 35* and *36*, were specimen blank samples of work sheets used.

Ex. 33 is the principal exhibit of the Administrator. It is a so-called master sheet which purports to set out data contained in underlying work sheets which were not offered in evidence. It was alleged to be honey-combed with error, and utterly unreliable in many details (*Supp. Vol. III*). But it was extensively relied upon by respondents (App. B, Findings 2, 10, 12, 15, 17 and 18).

(3) By the Southern oyster industry:

The *oral* evidence consisted of brief testimony by one witness, Mr. Strasburger. He offered as an exhibit a written statement of Mr. McPhillips of the Southern Shellfish Company. Both the oral testimony and statement were concerned primarily with emphasizing the need for uniform standards of fill (R. 1035-49).

No statistical evidence or data was offered by the Southern industry at either hearing.

(E) Brief and argument submitted by petitioner prior to Second Final Order

At the conclusion of the hearing the Presiding Officer announced that the parties were given 10 days

within which briefs and arguments could be filed (R. 1178).

No brief or argument was submitted by the Southern industry or by the attorneys for the Food and Drug Administration, who had participated extensively in the further hearing (R. 703-1178).

Counsel for petitioner filed such a brief, setting forth 23 requested findings of fact with detailed supporting references to the record, and its argument thereon (*Supp. Vol. III*).

The Second Final Order ignores every single requested finding and the supporting argument which your petitioner submitted to the Administrator (App. B).

SPECIFICATION OF ERRORS

Respondents Hon. Oscar R. Ewing and Hon. J. Donald Kingsley, and each of them, erred by their own actions in issuing, respectively, the *First Final Order* and the *Second Final Order*, and/or by the actions of their designated Presiding Officer, Hon. James B. Goding (Ex. 2), who conducted on their behalf both hearings (R. 4-5, 703); in the following errors which are *"not in accordance with law,"*[13] and were committed:

"Without Observance of the Procedure Required by Law"[14]

(1) In that respondent Kingsley, as Acting Federal

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[13]Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

[14]Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(4), *supra*, p. 17.

Security Administrator, signed the Second Final Order of August 3, 1948, without having previously read and considered in its entirety the record of the prior phase of these same proceedings before the Administrator, respondent Ewing, who had theretofore signed the First Final Order of March 10, 1948; because the Second Final Order purports to rely in part on the evidence and record adduced at the first hearing and findings therein, and to modify the findings and conclusions of said First Final Order; and because respondent Kingsley has certified that he only read and considered the evidence and record at the second hearing (*Supp. Vol. I, item 1*).

(2) In that respondent Ewing, as Administrator, purported to authorize respondent Kingsley to sign the Second Final Order and to certify as to the record thereto, without providing that he also read and consider the evidence and record on which the First Final Order of March 10, 1948, was based, which respondent Ewing alone has certified to having read and considered (*Orig. Vol. II, item 1*).

NOTE: Specifications Nos. 1 and 2 discussed, *infra*, pages 76 to 78.

(3) In that both said respondents erred by the acts of their duly designated Presiding Officer in his conduct of the hearings, as follows:

(a) in permitting Joseph Callaway, the chief witness for respondents and "continuously engaged in * * * *enforcement* work" (R. 14) of the Food and Drug Administration since 1914, to participate as counsel in cross-examination of witnesses for the industry (R. 353, 368, 392, 398, 420, 422, 425, 602-7,

803-4), for the reason that this is manifestly unfair and violative of procedural due process, and for the further reason that the elaborate questions and statements of Mr. Callaway (e.g. citations to record, *supra*, and R. 383-6, 392-5) make it virtually impossible to determine in the record whether he is testifying under oath as the principal witness, or making unverified observations as a participating counsel; and for the further reason that the Presiding Officer did not permit industry witnesses a similar opportunity to cross-examine Mr. Callaway, but required them to address their cross-examination through counsel (Goding, R. 487);

(b) in sustaining objections by counsel for the Government to questions addressed to Mr. Callaway as to whether he either wrote or had a hand in preparing the Administrator's First Final Order of March 10, 1948, on the grounds that the order is "out over the Administrator's signature as an official document" (Goodrich, R. 960) and that:

> "I have been designated to take evidence pertinent to the issues indicated in the notice of hearing. I do not consider that question pertinent to that issue." (Goding, R. 960);

(c) in sustaining the Government's objections to similar questions of Mr. Callaway as to whether he had written so much of paragraph 6 of the First Final Order as relates to browning, and so much of the first sentence thereof as states "browning is a type of discoloration occurring in oysters protruding above the packing medium" (Goding, R. 961-2);

(d) in similarly sustaining an objection to a question addressed to Mr. Callaway as to whether he or Government Counsel had written the third sentence of paragraph 6 of the First Final Order, stating that "excessive entrapped air can be avoid-

ed in good manufacturing process" (Goding, Callaway, R. 985, 991-2);

(e) in declining to permit argument with respect to the relevancy of these questions, and in precluding counsel for petitioner from completing an offer of proof of matters sought to be established by these questions addressed to Mr. Callaway, the first part of which offer, before interruption, read:

> "I offer to prove by these questions presently addressed to Mr. Callaway and likewise questions yesterday that: In violation of my understanding of the Administrative Procedure Act, §5(c), the order in issue of March 10, 1948, violates so much of that section as provides that '*save to the extent required for the disposition* of ex parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer— "

and in stating on such interruption that the offer was entirely irrelevant to these proceedings because it referred to exclusively quasi-judicial matters, and that rule making is quasi-legislative (Goding, R. 992-3).

NOTE: Specification No. 3 (a) to (e) discussed, *infra*, pages 79 to 90.

(4) In that both said respondents erred by their own acts and by those of their designated Presiding Officer in his rulings on the following preliminary motions:

(a) in omitting to observe the procedure of the Food and Drug Administration as published in the Federal Register, 11 F. R. 177A-541, 543; 21 C.F.R. 1-4(d), that:

> "The Food Standards Committee usually holds

informal public hearings, after appropriate notice, on proposals to formulate definitions and standards of identity for food to be announced for formal public hearings."

and in overruling the request of counsel for petitioner and others for a postponement for the reason that ordinarily such problems are thoroughly discussed in an informal meeting with the Food Standards Committee some months before the actual formal standards hearing is fixed; and that because this customary procedure was not followed in this case, and because there had been no opportunity to collect data for the first hearing in the month after the notice was issued, adequate standards could not be properly formulated and presented (Castle, Steele, R. 7-8; Goding, R. 10);

(b) in denying the motion by counsel on behalf of your petitioner and others that the hearing set for July 10, 1947, be postponed because "the industry has previously had no definite indication that a standard of identity for canned oysters would be fixed, no experimental packs have been made and * * * no consideration of the problems" had been undertaken, and that "after the notice was published * * * no canned oysters have been packed and * * * (it was) impossible to put up any experimental packs" prior to the time of hearing (R. 6-7);

(c) in overruling the request of counsel for petitioner that the standard of identity hearing be kept separate from the fill of container hearing since they are two separate standards (Castle, R. 11; Goding, R. 12-13);

(d) in overruling objection, made at the conclusion of the taking of evidence on the first hearing, to the promulgating of a standard of identity for

canned oysters until there had been adequate time to collect data on which such a standard could be based (Castle, Steele, Goding, R. 651-2).

(e) in refusing to hold a further hearing on the West Coast.

NOTE: Specification No. 4 (a) to (e) discussed, *infra*, p. 117.

(5) In that both said respondents erred by the actions of their designated Presiding Officer in his rulings on various matters of evidence, as follows:

(a) in receiving into evidence as respondents' Ex. 33, a purported master sheet summary of statistical data, over objection that the original records were not present, although there was testimony that they were available, and in overruling a request that receipt of Ex. 33 be deferred until after cross-examination (Goding, R. 816-7);

(b) in declining a motion to strike a statement by witness for respondents with respect to the chemical content of the brine solution in canned oysters shown on Ex. 33 until the working papers from which the statement was made were available, on the ground that earlier when witnesses for petitioner were testifying respondents insisted that the work sheets be produced, and that the same Presiding Officer had ruled that counsel for the Government:

"may suspend examination of the witness * * * until such time as (the industry witness) has the basic (work sheet) material"

available (R. 262), and that pursuant to such ruling the industry witness left the stand until he was permitted to return (R. 564-5) after having had prepared a 45 page mimeographed copy of work sheets (Ex. 19); and in the further action of the

Presiding Officer in manifesting bias in reiterating his ruling that the work sheets need not be prepared after the foregoing ruling was recalled to his attention (Goding, R. 857);

(c) in requiring cross-examination to continue with respect to work sheets recognized by him and by counsel for the Government to be "not in evidence" (R. 921);

(d) in overruling the request of petitioner that the work sheets supporting Ex. 33 be offered in evidence while at the same time granting the Government's request to insert thereon certain data derived from said work sheets which had been omitted in its preparation (Goding. R. 999), but denying to petitioner the right to have similar corrections made (Goding, R. 911);

(e) in refusing to receive in evidence the work sheets on which Ex. 33 was based (R. 1000-4); and in refusing to give the work sheets an identification number so that subsequent review may be had of the propriety of the Examiner's ruling in excluding them (R. 1004-6); and in ruling that the request for placing the work sheets in the record is denied on the ground that the Administrator "has complete authority over all official records in the Agency and can, himself, then place them in the record" (R. 1009); and in the Acting Administrator's omission and refusal to read or consider the work sheets (*Supp. Vol. I, item 1*); and in his refusal to place them in the record (*Supp. Vol. I-IV*).

NOTE: Specifications Nos. 5(a) to (e) discussed, *infra*, pages 100 to 102.

(f) in overruling a motion to strike a statement by a witness for respondents purporting to quote a woman employee at a plant in Willapa Harbor;

Washington, who was alleged to have said that she had no difficulty in packing an increased fill, and has had experience with both steamed and blanched oysters and claims that it is as easy to pack one as it is the other, on the ground that it is hearsay and that there was no opportunity to cross-examine this woman (Hansen, Goding, R. 866); and in thereafter relying on such evidence[15] and neglecting to give any consideration to, or to make reference to, an affidavit of said women which disclaimed such statements (Ex. 42); and on rejecting other pertinent rebuttal affidavits (R. 1166-77; *infra*, App. F, pp. 54 *seq.*)

(g) in overruling a motion of petitioner to strike a statement by a witness for respondents with respect to alleged unfavorable comments of buyers as to blanched and steamed oysters, on the ground that it is hearsay, that it is not supported by affidavit or other verification, or by explanation of what is meant by the term "unfavorable" (R. 879-880);

(h) in overruling counsel for petitioner's motion to strike the statement of Mr. Callaway with respect to the results of a visual appraisal made by him and others, purportedly as their collective opinions, on the ground that no report was available or way of evaluating the method by which the visual appraisal was made (Goding, R. 800-2);

(i) in overruling an objection to testimony purporting to report the collective opinions of several persons that oysters prepared by blanching were "indistinguishable from pre-steamed oysters in odor, taste and appearance, but that the liquid from the cans of blanched oysters was less attractive

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[15]App. B, Finding 16, p. 21.

than the liquid from the pre-steamed oyster," on the ground that there was no factual data upon which the accuracy of such general statements can be predicated or appraised (Goding, R. 802);

(j) in overruling a motion to strike testimony that "the liquid from the cans prepared from blanched oysters contained sediment material which made the liquid cloudy in appearance. In this it differed somewhat from the clear liquid in canned oysters prepared for canning by the pre-steaming in the shell," on the ground that there is no substantiating testimony of any quantitative or measurable kind whereby petitioner can in any way appraise the statements and that no documentary evidence had thus far been offered to support such a statement (Callaway, R. 803; Goding, R. 805);

(k) in improperly ruling and in manifesting bias by interjecting in the absence of objection by opposing counsel, the Presiding Officer's own interruption and objection to a question by counsel for petitioner, reading as follows:

> "Q Now, in order to make this organoleptic examination with respect to appearance, did you then proceed with your various trays there to stir or agitate the liquid in the pre-steamed and the blanched to come to a unanimous conclusion with respect to its having what you term—"

and to the Presiding Officer's statement that:

> "I, on my own initiative, suggest it is argumentative. I rule it out." (R. 904)

NOTE: Specifications Nos. 5(f) to (k) discussed, *infra*, pages 92 to 96.

(l) in refusing to permit receipt in evidence for subsequent court inspection of representative cans of oysters so that the court might have before it some tangible evidence of the matter in dispute

with respect to deterioration of quality through browning, twisting, and pressure marks in cans of oysters required to be packed with an excessive fill of oysters (Goding, R. 1023, 1027-30);

NOTE: Specification No. 5(1) discussed *infra*, pages 102 to 104.

(m) in unlawfully *imposing* on petitioner a burden of proof as to *increased* standards for Western oysters (Goding, R. 704), and in having *relieved* Southern producers of a burden of proof to justify their "application" or "proposal" (Ex. 6) for *reduced* standards (Goding, R. 11-12);

NOTE: Specification No. 5(m) discussed *infra*, pages 113 to 116.

In that the following errors are further "*not in accordance with law*,"[13] and constitute portions of findings which are:

"Unsupported by Substantial Evidence":[14]

(6)[15]In Finding No. 1 that:

The common name of the *ostrea virginica* species, when canned, is "Oysters" or "Cove Oysters," and that oysters of the *ostrea gigas* type are commonly known as "Pacific Oysters," to the extent that it omits to find that oysters of the *ostrea gigas* species are and and also have long been "commonly known," "when

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[13]Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

[14]Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(5), *supra*, p. 17.

[15]Specifications Nos. 6 to 18 relate to Findings Nos. 1 to 8, inclusive, under Definitions and Standards of Identity, in the First Final Order of March 10, 1948 (App. A, pp. 2 to 7, inclusive).

canned", as "Oysters", and omits to find that petitioner has for the past 16 years (Bailey, R. 755) used the label offered in evidence by respondents which clearly indicates that its product has been labeled and commonly known as "OYSTERS" and not as "Pacific Oysters" (Ex. 31), and that the only other label of record similarly identified by respondents, reads "TILLAMOOK BRAND FANCY SELECT OYSTERS", and not "Pacific Oysters" (Rowe, R. 634); and to the extent the finding omits reference to testimony of the chief witness for the Administrator that the food is "*ordinarily known*" as "*canned oysters*" (Callaway, R. 72).

(7) In Finding No. 2 that:

> "the methods used for canning Eastern oysters and Pacific oysters are essentially the same",

when in fact the record does not disclose any canning of Eastern oysters, and in omitting to find as to Southern oysters or Cove oysters, that the methods are radically different from those used for Western or Pacific oysters. The finding should have been that the methods used for canning Southern or Cove oysters and Pacific or Western oysters are radically different because of the differences of biological characteristics of the oysters and the widely different heat, pressure, and temperature and processing methods to which they are subjected (e. g., Carriere, R. 453; Bailey, R. 714-717).

(8) In omitting to modify Finding No. 2 of the First Final Order to show that Willapoint Oysters, Inc., a large producer (Bailey, R. 714-717), and two small Western canners (Hansen, R. 1051-3), are pres-

ently using the blanching system, and in omitting to find that the pre-steaming method used by other Western canners is radically different from the method employed in petitioner's blanching system (Hayes, Ex. 25), and is similar to a method used pre-war by the Southern packers with high consumer acceptance but abandoned by them in 1942 when the Tin Conservation Order became effective because they could not continue such a quality pack under an increased fill above 5 ounces (Carriere, R. 457; Holcombe, R. 555; Strasburger, R. 1045-1048).

(9) In Finding No. 3 that:

"salt may be added for seasoning",

when the record shows that salt is always added for seasoning so as to form a brine solution, and that the degree of salinity has a marked effect on the quality of the product (Bailey, R. 768-9, 771).

(10) In Finding No. 4 that:

"Eastern oysters are commonly canned whole," when the record shows that no Eastern oysters are canned, and further shows that Pacific or Western oysters are also commonly canned whole. The sentence is slanted and distorted and should properly read: "both Southern and Pacific oysters are commonly canned whole" (App. C, Finding 12, p. 29).

(11) In Finding No. 5 which again refers to canned "Eastern" oysters when in fact all of the evidence shows that it is canned Southern oysters that are marketed and sold; and in finding that they "are sold in the same trade channels" as Western or Pacific oysters. The great bulk of distribution of canned West-

ern or Pacific oysters is on the West Coast, and over 98 per cent are sold West of the Mississippi River. Southern oysters are chiefly sold east of the Mississippi River in the populous eastern section of the United States. It is true that to a degree Southern oysters have invaded the Western territory (Bailey, R. 726, 794).

(12) In Finding No. 5 in relying on mere rumor and hearsay (Ex. 4, 5, 6 and 7) which was incompetent.

(13) In omitting to state in Finding No. 5 that canned *Southern* oysters, being small, are generally used for oyster stews and *are not suitable for frying* (Holcombe, R. 556; Jastremski, R. 519), and in omitting to find that Pacific oysters, being larger, are generally well adapted to frying and may also be used for stews (Bailey, R. 535, 726; Callaway, R. 39-40; Charlton, Ex. 28, 30).

(14) In Finding No. 6 that the watery liquid surrounding the oysters is usually discarded if oysters are used for frying. This is contrary to the record.
(Kincaid, R. 185; Bailey, R. 728-9; Charlton, Ex. 30).

(15) In Finding No. 7 that:

> "raw oysters are packed directly into the container"

and in stating that:

> "raw oysters may be blanched and packed in containers with the liquid in which they are blanched as a packing medium",

because the evidence is directly contrary (Bailey, R. 729).

(16) In Finding No. 8 (App. A, p. 5) in omitting to find from undisputed evidence that: The flavor of canned oysters properly packed by the blanching process is, in the judgment of the only consumer witnesses who testified in this proceeding, far superior to any other pack [Charlton, Ex. 28 (App. E. hereof, p. 44); Callaway, R. 46; Holcombe, R. 555; Carriere, R. 457; Bailey, R. 722; Cf. Hansen, R. 1104-5].

(17) In finding in the Conclusion (App. A, §36.5 (b)), that:

> "canned oysters include a packing medium of water or watery liquid draining from the oysters before or during processing"

and in omitting to consider the high food value content of the packing medium (Ex. 29, 30; App. D, §379, p. 40).

(18) In finding in the Conclusion (App. A, §36.5(c)), that when canned oysters are prepared of the species *ostrea virginica*, the name of the food is "Oysters" or "Cove Oysters," whereas when they are prepared of the species *ostrea gigas*, the name of the food must be altered to "Pacific Oysters."

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(19)[16]In Finding No. 3 that the increased fill caused some minor manufacturing difficulties. The evidence shows that the increased fill under the Tin Conservation Order required a complete abandonment of a fresh-opened raw pre-cooked oyster which had theretofore enjoyed the greatest degree of acceptance of any Oyster in the history of the Southern industry (Holcombe, R. 555; Carriere, R. 457).

(20) In Finding No. 4 that canned Pacific oysters are not subject to the requirements of the existing standard of fill of container. It should have found that they are not subject to the 1944 order, but are subject to prior lawful orders fixing a 5 ounce standard of fill (*supra*, pp. 18-21).

(21) In Finding No. 5, that:

> "canned Pacific oysters were often labeled to show the total weight of oysters but not the drained weight of oysters,"

and in omitting to show that such practice was (*a*) expressly authorized by Food and Drug Administration decisions (App. D, p. 38, and 40, Op. 88 and 379), and (*b*) that in the further hearing of July 1948 counsel for respondents brought out that petitioner, the largest packer of Western oysters, had voluntarily placed on its label the imprint "Net Drained Weight 5 Ounces Oyster Meat" (R. 755, 759), and that counsel for respondents offered in evidence Ex. 31 which confirms that contrary to the statement in Finding No. 5, petitioner's oysters are now voluntarily labeled to show the drained weight as well as net weight. This finding is further contrary to the evidence in conveying an impression that some brands of Pacific oysters are not labeled, and by an omission to state anything with respect to Southern oysters to convey the impression that they are uniformly labeled to show drained weight. There is nothing in the rec-

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[16]Specifications Nos. 19 to 31 relate to Findings Nos. 1 to 8, inclusive, under Standards of Fill of Container in the First Final Order of March 10, 1948 (App. A, pp. 7 to 13, inclusive).

ord to support such an inference. Finding of Fact No. 5 is further in error in finding that a "condition" exists which is likely to confuse and deceive consumers in that it is impossible to know to what "condition" this sentence refers, particularly in view of the fact that one of the principal antecedent sentences relating to labeling of canned Pacific oysters is shown to have been contrary to the evidence; and further in error in relying on mere rumor and hearsay (Ex. 4, 5, 6 and 7).

(22) In Finding No. 6 in omitting to show that experimental packs sponsored by canners of Pacific oysters showed that there was a serious impairment of quality when drained weights in excess of 5 ounces theretofore prescribed for such oysters were used (Esveldt, R. 308; Ex. 14-17; Ex. 27); and in finding that the assignment of demerits was made on an arbitrary basis; and in omitting to find that a merit system basis of evaluating quality is not arbitrary but, on the contrary, is standard practice in the food industry (*Supp. Vol. III*, pp. 13-14).

(23) In Finding 6 (the first unnumbered paragraph), that browning can be eliminated by the removal of excessive entrapped air. This is contradictory to the first sentence, which indicates that browning occurs when oysters protrude above the packing medium. It is contrary to the evidence in suggesting that West Coast operators do not follow good manufacturing process (Hansen, R. 1090-1; 1059). It is further in error in suggesting that liver spots are commonly found on canned Pacific oysters. They are more commonly found on canned Southern oysters (Callaway,

R. 479-81; Bailey, R. 731). It is in error in suggesting that browning is not as noticeable as liver spots. It is more noticeable and is the greatest single defect in marketing (Bailey, R. 731).

(24) In Finding 6 (the third unnumbered paragraph), in stating that pressure marks are not unsightly and in omitting to state that they are blemishes and that they do affect the appearance of the oysters (Bailey, R. 732).

(25) In Finding 6 (the fourth full unnumbered paragraph) in omitting to show that the Pacific oyster is susceptible to breakage and by such omission to contradict the finding of respondent of the Second Final Order (App. B, p. 17, Finding 9).

(26) In Finding 6 (the fifth full unnumbered paragraph), that there is no significant correlation between these various blemishes and the drained weight of oysters (Clough, Esveldt, Ex. 14-17).

(27) In Finding 6 (the last full unnumbered paragraph), in omitting to take into consideration at all the evidence offered by petitioner in Ex. 28, 29 and 30 with respect to quality (App. E hereof).

(28) In Finding No. 7 that pre-steamed or blanched Pacific oysters can be packed to as high a weight as 11 ounces into the standard 10½ ounce can which, after processing, yields 6½ ounces without impairment of quality due to the fill (Clough, Esveldt, Ex. 14-16; Bailey, R. 733).

(29) In Finding No. 8 in omitting to show that in no event could technique employed in hand selecting the test pack made experimentally by an inspector

of the Food and Drug Administration be used commercially (Esveldt, R. 315).

(30) In that each of the Conclusions set forth in the First Final Order is contrary to the evidence for reasons shown above and for the omission to state that "the return to the fill in use prior to 1942" would be a return to a 5 ounce fill promulgated and approved by successive rulings of the Food and Drug Administration and its predecessors (App. D).

(31) In that the ordering paragraph of the First Final Order (App. A, pp. 12-13) is void because not supported by substantial evidence.

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(32)[17] In that each of the Findings Nos. 1 and 2 (App. B, pp. 15-17) and Nos. 9 to 18 (App. B, pp. 17-22), and Conclusions based thereon and ordering paragraph made thereunder (App. B, p. 23), is not made:

> "on the basis of evidence of record" (App. B, p. 23),

as recited therein, but is in fact based only upon a consideration of pages 703 to 1178 and Exhibits 22 to 42 of "the evidence of record" (*Supp. Vol. I, item 1*).

(33) In Finding No. 1 (amending former Finding 6) in that it omits to find with respect to the liquid packing medium that:

> "the liquid portion of Willapoint canned oysters has a significant food value quite comparable

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[17]Specifications Nos. 32 to 36 relate to Findings Nos. 1 to 2, inclusive, under Definitions and Standards of Identity, in the Second Final Order of August 3, 1948 (App. B, pp. 15-17).

to the entire content of other well known canned foods"

as specifically requested in the proposed findings of fact submitted by petitioner (*Supp. Vol. III*, p. 4), and as shown in the record before him (App. E, p. 53).

(34) In Finding No. 2 (amending former Finding 7) by omitting to show in Footnote 2, thereof, with reference to experiments by Willapoint Oysters, Inc., that extensive experimental work was done earlier on its behalf with respect to pre-steamed oysters (Clough, Esveldt, Ex. 14-17); and that blanched oysters are shown by the evidence to have a larger content and lesser shrinkage than steamed oysters covered by such experiments [App. A. of Ex. 28 (App. E hereof, p. 45)], which experiments confirm knowledge of the impossibility of increasing the fill of blanched oysters beyond the 5 ounces drained weight, and by omitting to refer to a typical consumer complaint as to a "solid mass with no liquid" (Ex. 18) when petitioner had experimented with the heavier pack (R. 527).

(35) In Finding No. 2 that canned oysters prepared from blanched oysters are practically indistinguishable from those prepared from oysters that have been pre-steamed in the shell in that such evidence is completely contrary to the record, and gives credence, with studied design, to the testimony of the Administrator and ignores all of the evidence relating to this subject offered by petitioner, and particularly Ex. 28 (App. E hereof), which reported the only objective and non-partisan study of con-

sumers' wishes with respect to canned oysters, and which reported that the blanched Willapoint oyster was determined to be the best oyster of three representative brands of oysters, one of which was the blanched Willapoint oyster, the second the steamed Western oyster, and the third the Southern oyster, and in completely ignoring facts shown in petitioner's brief to the Administrator (*Supp. Vol. III*, p. 5, Proposed Finding No. 10).

(36) In Finding No. 2 and 12 that the loss in weight approximates 16 per cent, when the evidence showed that in the blanching process the oysters shrink in volume an average of 2.76, whereas in the steaming process the oysters shrink in volume 16.66 per cent (App. E, p. 42).

(37)[18] In Finding No. 9 that Pacific oysters prepared for canning by the blanching method are no better than canned Pacific oysters prepared for canning by pre-steaming in the shell, in that it totally ignores Ex. 28.

(38) In Finding No. 9 that large scale purchasers are alleged to regard certain oysters as inferior because it was based on pure hearsay and rumor which was received over objection of counsel for petitioner, and which counsel for petitioner had no way of counteracting or meeting (Hansen, R. 879-880).

(39) In Finding No. 9 (the third to fifth sentences) (App. B, pp. 17-18) relating to labeling and adver-

[18]Specifications Nos. 37 to 58 relate to Findings Nos. 9 to 18, inclusive (under Standard of Fill of Container), in the Second Final Order of August 3, 1948 (App. B, pp. 17 to 23).

tising the blanching method, in omitting to state that the absence of advertising and changed labeling has been due to the very uncertainty which petitioner is suffering because of the instant litigation and of the refusal of the Food and Drug Administration to permit it to market its quality pack (Bailey, R. 759, 1138).

(40) In Finding No. 10 in purporting to refer to certain designated pages of the first transcript although he had subsequently certified that he read only the second transcript, and in stating that the total quantity of the liquid which separates, based on the weight of raw oysters, is the same whether the oysters are packed into the can raw, or are given a partial cooking in boiling salt water prior to placement in the can, or partly cooked in the shell by steaming, in that with studied design it totally omits to refer to the scientific experiments conducted on behalf of petitioner [Charlton, Ex. 28 (App. E, hereof, p. 42)].

(41) In Finding No. 11 in suggesting that raw oysters are packed without water, producing a murky liquid which is objectionable to many purchasers, in that the statement is supported by a record reference to *un*blanched raw oysters and has no bearing whatever on the issues before the Administrator on rehearing which were confined to the packing of *blanched* raw oysters (R. 703).

(42) In relying upon Ex. 33 and the direct evidence in support thereof, and in omitting to refer to contradictory evidence with respect thereto shown sub-

sequently by cross-examination of the witness who offered the same (Callaway, R. 882-1011).

(43) In Finding No. 12 that a lower put-in weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water, in that with studied design it ignores the fact that the order outstanding would require petitioner to put 9 ounces of oysters into its can and 1½ ounces of water to yield a drained weight of 6½ ounces of superior blanched oysters (App. B, p. 19, Finding 12), whereas under the existing order with respect to steam-opened Southern oysters, Southern producers are permitted to reduce the amount put into a can from a prior standard of 7½ ounces to a new standard of 6½ ounces of oyster, and to increase the amount of water added to the can from 3 ounces previously authorized to 4 ounces (App. C., p. 27, Finding 9).

(44) In Finding No. 13, that with heavily pre-steamed oysters a put-in weight of around 7½ ounces will yield approximately 7 ounces. The figures should be just reversed. With the heavily pre-steamed Southern oysters a put-in weight of around 7 ounces will pick up additional weight and yield 7½ ounces (Callaway, R. 978; Holcombe, R. 561). The finding omits to show that under the challenged orders the Southern producers would be permitted to place over 100 per cent more brine into the can than would the Pacific producers (See Specification No. 43).

(45) In Finding No. 14 (App. B, p. 20) that the put-in weight of oysters is not an accurate measure of fill of container for canned oysters because all

oysters are not pre-cooked to the same degree, and in omitting to state that the put-in weight is the prescribed method for measuring contents of many canned foods, such as most canned fruits.

(46) In Finding No. 15 that the liquid draining from oysters has little food value and comes largely from water added as a packing medium and in so doing to ignore its own prior finding in Finding No. 12 that at least 2½ ounces of the liquid comes from the oysters themselves and not from the water, and in omitting to consider its prior determination that the "liquid has certain food value" (App. D, p. 40), and in omitting to consider Ex. 30 which showed that the "*liquid portion* of Willapoint canned oysters has a significant food value quite comparable to the *entire contents* of other well known canned foods" (App. E, p. 53).

(47) In Finding No. 16 that canned oysters which yield 5 ounces are slack filled and in referring by footnote therein to Ex. 32. The record shows that the photographs shown in Ex. 32 were taken at an angle, that the oysters were drained and shifted, and that it is impossible to tell from photographic inspection the fill or the degree to which oysters had been blemished by overfill, and further afford no basis of comparison with Southern oysters as reduced from 7½ ounces to 6½ ounces by the Administrator's order (Nicholson, R. 836-8); and in ignoring the photographs shown in Ex. 38, which show the waste and destruction of oysters incident to efforts by a Pacific Coast packer to comply with an excessive 6½ ounce drained weight.

(48) In Finding No. 17 (App. B, pp. 21-2), that: "the factors of quality in canned oysters most important to consumers are not disclosed by the record,"

in that it is directly contrary to the record and ignores Ex. 28, which found that Willapoint Oysters packed by the blanching process were judged best in an impartial Consumer Acceptance Test by three competent and disinterested participants (App. E, pages 42-44; 47-50).

(49) In Finding No. 18 (App. B, p. 22) in minimizing the difference in flavor and appearance and in the food value of the liquid packing medium of blanched oysters, and in omitting to consider or make any reference to Ex. 28, or in explaining why, if flavor and food value of the packing medium is inversely proportional to the amount of water added, the Final Orders propose to reduce the fill of container for Southern packers so as to permit them to place 6½ ounces of oysters and 4 ounces of water in a can while requiring Western packers to place at least 8½ ounces of oysters and only 2 ounces of water into the can. (See above Specification No. 43)

(50) In each of the Conclusions (App. B, p. 23) for the reason that each of them as set out in the four paragraphs thereof is not supported by the evidence; and in his Order affirming the prior order established by respondent Ewing (App. B, p. 23) in that it is based on findings of fact and conclusions, all of which are not supported by the evidence.

NOTE: Specifications Nos. 6 to 50, inclusive, relating generally to the absence of supporting evidence, discussed, *infra*, pages 91 to 113.

In that the following errors are further *"not in accordance with law,"*[19] and are:

"In Excess of Statutory Jurisdiction;"[20]

(51) In finding that the "common name of oysters" of the *ostrea virginica* species, when canned, is "Oysters" *or* "Cove Oysters," and in finding at the same time that "oysters of the species *ostrea gigas*, commonly known as 'Pacific Oysters' are canned in considerable quantities" (App. A, p. 2, Finding 1).

(52) In concluding that when whole oysters are canned the name of the food is "Oysters" or "Cove Oysters," if of the species *ostrea virginica*, and that the name of the food is "Pacific Oysters" if of the species *ostrea gigas*, for the reason that he has not made requisite findings of fact as to the "common or usual name, so far as practicable" as required by §§401 and 701(e) of the Federal Food, Drug and Cosmetic Act (*supra*, pp. 11-12), and in so doing has prescribed *unreasonable* standards of identity [App. A, p. 5-6, §36.5(c)(1)].

(53) In prescribing an *unreasonable* standard of fill of container for what he has termed "Pacific Oysters" under which petitioner would be required to increase the fill of container by 30 per cent [App. A, p. 12-13, §36.6(a)].

(54) In prescribing unreasonable standards of fill of container for petitioner's blanched oysters, and in

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[19]Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

[20]Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(3), *supra*, p. 17.

finding that a reasonable requirement for blanched oysters packed with the blanching process which will promote honesty and fair dealing in the interest of consumers is a drained weight of not less than 59 per cent of the water capacity of the can (App. B, p. 23).

NOTE: Specifications Nos. 51 to 54 discussed, *infra*, pages 116 to 117.

In that the following errors are further "*not in accordance with law,*"[21] and are:

"Arbitrary, Capricious, and an Abuse of Discretion":[22]

(55) In denying (*Orig. Vol. I. item 1*) so much of petitioner's petition of April 29, 1948 (*Orig. Vol. I, item 2*) as sought reconsideration, revision, and oral argument with respect to the First Final Order of March 10, 1948, including among other things, the petition for revision and correction of paragraph 36.5 so as to permit petitioner to continue to use the name "Oysters" (*Orig. Vol. I, item 2*, pp. 20-1).

(56) In acting in an arbitrary and capricious manner in committing all of the errors set forth above in Specifications Nos. 1 to 55, including conduct of a hearing on short notice without adequate opportunity for preparation, refusal to hold a hearing on the Pacific Coast to serve the convenience of West Coast parties, failure to read and consider the entire record, permitting the principal witness for the Administrator to participate in the preparation of an order based on

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[21]Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

[22]Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(1), *supra*, p. 17.

his own evaluation of his own testimony, omitting to give consideration to testimony of petitioner offered both on oral examination and in reliable affidavit form, proposing findings of fact that with studied design give credence primarily to the testimony of respondents, giving dominant weight to their own affidavits and ignoring those of petitioner, and in each of the above specifications manifesting bias, prejudice, and a determination to prejudge the case without considering the merits thereof as presented by petitioner.

(57) In denying the petition filed by petitioner in February, 1948 (*Orig. Vol. I, item 7*), which requested postponement and reconsideration of the order and pointed out therein in extensive detail the arbitrary and unnecessary restrictions imposed on West Coast producers and the threat to the continued growth of a new and healthy industry in the Pacific Northwest (*Orig. Vol. I, item 6*).

NOTE: Specifications Nos. 55 to 57 discussed, *infra*, pages 117 to 119.

And; in that the following errors are further "*not in accordance with law*,"[23] and are:

"Contrary to Constitutional Right":[24]

(58) In taking the property of petitioner without due process of law in requiring it to abandon its long-continued use of the term "Oysters" and in conferring *a new and exclusive right* upon Southern

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[23]Food, Drug, and Cosmetic Act, §701(f)(3), 21 U.S.C.A. 371(f)(3), *supra*, p. 12.

[24]Administrative Procedure Act, §10(e), 5 U.S.C.A. 1009(e)(B)(2), *supra*, p. 17.

producers to use such a term; and in requiring petitioner to pack its oysters to such an excessive standard of fill as to discolor, disfigure, and distort, and thereby destroy a high customer acceptance which has developed for them; or in the alternative to place on the face of the can a label, indicating that it is "substandard," which would likewise destroy petitioner's business [App. C, §36.6(e), p. 32-3] which by the challenged First Final Order became §36.6(d) (See App. A, p. 13).

(59) In conducting its hearings and making its findings and an order in a manner that are violative of judicial due process for all of the reasons enumerated above in Specifications Nos. 1 to 58, inclusive.

NOTE: Specifications Nos. 58 and 59 discussed, *infra*, pages 120 to 121.

ARGUMENT OF THE CASE

Petitioner challenged the validity of the First and Second Final Orders because compliance with these orders would:

(A) destroy petitioner's long-continued use on its labels of the generic term "Oysters" and transfer to Southern producers the exclusive use and good will of that term; and

(B) destroy petitioner's quality pack by requiring that an excessive quantity of its Western oysters be crammed into the can with resultant discoloration, disfiguration, distortion, and breakage.

I. Concise Summary

Two entirely different species of *canned* oysters are produced in this country, one primarily in the South and known by the biological term *ostrea virginica*, and the other primarily in the West and known by the biological term *ostrea gigas*. The biological differences go back over millions of years. Both have long been marketed and sold as "Oysters". Both are also variously known, respectively, as "Southern" or "Cove" oysters; and as "Western" or "Pacific" oysters.

The methods of processing and canning these two different species are radically different, the end result being that the Southern or *virginica* species is very greatly dehydrated and shriveled before placing into the can, whereas the Western species is placed into the can in approximately its natural shape, condition and size. In both regions a pre-determined weight of oyster meat is placed into the can and the void spaces are filled with a brine packing medium. Because of

the biological and processing differences, any predetermined weight of dehydrated Southern oysters will subsequently absorb a part of the packing medium after the can has been sealed and placed in the retort for the "sterilization" cook; whereas any like predetermined weight of natural conditioned Western oysters will not so absorb a part of the brine, but on the contrary, will subsequently exude a substantial part of its body ingredients into the brine packing medium after the can has been sealed and placed in the retort for the "sterilization" cook, thereby forming a nectar.

The challenged orders recognize the biological differences by requiring *a new and dissimilar "standard of identity"* for each species, which would compel the Western or *ostrea gigas* type, long marketed by petitioner and other Western producers as "Oysters" (and also known by regional names) to be henceforth *only* identified as "Pacific Oysters", while permitting the Southern or *ostrea virginica* type, also long marketed by Southern producers as "Oysters" (and also known by regional names) to enjoy henceforth an exclusive right to use the name "Oysters".

But, having translated the biological differences into new requirements for different names that upset long established practice, the challenged orders then proceed to disregard these same differences of biology and processing, and to require *a new and identical "standard of fill"* by requiring that both species be so packed as to yield, after sealing and processing in the "sterilization" cook, an *identical* drained weight of 6½ ounces.

This has never been done and compliance is impossible, because of the biological and processing differences.

The Southern packers fill a standard 10½ ounce can with approximately 6¼ ounces of oysters and 4¼ ounces of brine solution. The Southern oysters will absorb approximately ¼ ounce of brine after the can is sealed, and thus will yield a drained weight of 6½ ounces of oyster meat and a remaining 4 ounces of brine. But the Western packers would be required to fill an identical standard can with approximately 9 ounces of oysters and 1½ ounces of brine. This would be required because Western oysters will exude 2½ ounces of natural body content into the packing medium after the can is sealed, producing a drained weight of 6½ ounces oyster meats and 4 ounces of nectar (made up of the original 1½ ounces brine solution and 2½ ounces of the pure ingredients of the oyster). Such excessive crowding would cause discoloration, disfiguration, distortion, and breakage, and thereby destroy the quality pack of Western oysters, as heretofore marketed by petitioner.

II. Argument[25]

The extent of judicial review of these two final orders is determined by §701 of the Food, Drug and

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[25]Pursuant to this court's Rule 20(d), Specification of Errors, *supra*, pp. 45 to 73, have stated the full substance of evidence erroneously admitted or rejected. Similarly, the Specifications have stated, "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

To conserve space and keep the brief within reasonable limits, the Argument section will not restate facts and argument set out or referred to therein.

Cosmetic Act, *supra*. It confers jurisdiction on this court to set aside an order if it is "not in accordance with law". The legal tests of judicial review are codified by §10(e) of the Administrative Procedure Act, *supra*. The two final orders are alleged by the pleadings and Specification of Errors to be unlawful in each of the 5 enumerated legal standards of that Act, as follows:

(A) made without observance of procedural requirements;
(B) unsupported by substantial evidence;
(C) in excess of statutory jurisdiction;
(D) arbitrary, capricious, and an abuse of discretion; and
(E) contrary to constitutional rights.

These points are discussed in that sequence.

A. The Orders Were Made Without Observance of Procedural Requirements

Respondent Ewing certified in effect that he based his order on the evidence at the first hearing (*Orig. Vol. II, Item 1*) being pages 1 to 701 of the testimony and Exhibits 1 to 21, in issuing his First Final Order. After the remand directed by this court's order of June 8, 1948, to take further evidence, respondent Kingsley[26] certified in effect that he based his order on *only* the evidence at the second hearing (*Supp. Vol. I, Item 1*) being pages 702 to 1178 of the testimony

[26]No legal authority appears to exist for Mr. Ewing to have delegated these duties to Mr. Kingsley (11 F.R. 177-A-518, §1.1; 21 C.F.R. §§1.1, 1.2). While Specification of Error No. 2 challenges the delegation, it is assumed, *arguendo*, to have been lawfully accomplished pursuant to some authorization not known to petitioner.

and Exhibits 22 to 42, in issuing his Second Final Order.

But the Second Final Order by its terms supplemented, modified, and amended the First Final Order (*App. B, pp. 15, 16, 17-23*). Its further findings of fact make frequent reference to *isolated* pages of testimony and to *isolated* exhibits received in the first hearing (*App. B. pp. 18, 19, 20, 22*) which evidence, however, in its entirety had been neither read nor considered by respondent Kingsley (*Supp. Vol. I, Item 1*). In signing the Second Final Order, respondent Kingsley recites:

> "*It is ordered,* That no change be made in the definition and standard of identity for canned oysters or in the standard of fill of container established by *my* final order of March 10, 1948." (*App. B. p. 23*)

But the "final order of March 10, 1948" was not "his" final order. It was that of respondent Ewing (*App. A, p. 13*).

(1) The two successive final orders are unlawful because neither of the respondents conscientiously read or considered all of the evidence. *(See Specifications Nos. 1 and 2, supra, pp. 45-6.)*

These procedural defects are not technical but substantial. *Morgan v. United States*, 298 U.S. 468, 481 (1936). The basic "rudiments of fair play" require a conscientious examination and consideration of the *entire* record by the fact finder. Violation of these requirements is a fatal defect of procedural due process. A unanimous court held:

> "*There is thus no basis for the contention * * * that one official may examine evidence, and*

> *another official who has not considered the evidence may make the findings and order.* * * * It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. *For the weight ascribed* by the law *to the findings*—their conclusiveness when made within the sphere of the authority conferred—*rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty* cannot be performed by one who has not considered evidence or argument. It *is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.*"

The court held that the lower court had erred in striking out the allegations in paragraph IV of a bill of complaint with respect to these matters. The text thereof is set out at 298 U.S. pp. 474-5, footnote 1. Its language parallels the allegations of petitioner's Second Supplemental Petition for Judicial Review filed in this case. In setting aside the orders, the Supreme Court concluded, at pp. 481-2:

> "*The requirements are not technical.* * * * *the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.*"

The two instant Final Orders have similarly denied judicial due process and should be set aside for these reasons.

(2) The First and Second Final Orders are unlawful because the findings of fact and conclusions supporting them were not, in truth, made by either respondent, but were in fact, unlawfully prepared by subordinate officers and employees who were also engaged in the performance of investigative and prosecuting functions which led to these orders and who appeared at the hearings as witness and as advocate for the Administrator. ***(See Specifications No. 3(a), (b), (c), (d), and (e), supra, pp. 46-48.)***

> Mr. Joseph Callaway testified that since 1914 he has "been *continuously engaged in* work which might be called *enforcement work* in connection, first, with the Food and Drug Act of 1906, and later with the Food and Drug and Cosmetic Act of 1938." (R. 14)

He was the principal witness for the Administrator in both hearings.[27] He also participated extensively in the cross-examination of industry witnesses.[28]

Mr. William W. Goodrich appeared as attorney for the Administrator (R. 702). He participated extensively in direct and cross-examination of witnesses in prosecuting the Administrator's case and in resisting petitioner's evidence (R. 707, 720, 736-7, 743, 749-793, *et seq.*, to 1175).

Petitioner sought by cross-examination to show that findings of fact and conclusions in the Administrator's final order were in fact prepared by Mr. Callaway and by Mr. Goodrich (R. 960-2, 991-3).

Objection by Government counsel to such cross-

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[27]See references to his extensive testimony, *supra*, in the Table of Witnesses and Exhibits Before Administrator.

[28]See Specification of Error 3(a), *supra*, pages 46-7.

examination was sustained by the Presiding Officer, first without stating any reasons (R. 960); later because "it is out over the Administrator's signature as an official document" (R. 960); and still later because it was not "pertinent" to the issues on rehearing (R. 960). Subsequently counsel for the Administrator objected on the ground

> "that the order is *signed* by the Administrator, issued by him, *not under his name, but by him,* and the question is improper for that reason." (R. 991)

When Mr. Callaway was asked whether he or Mr. Goodrich wrote portions of the findings, objections were again sustained without reason (R. 992).

Petitioner then attempted to make an offer of proof that the findings and conclusions were written by Mr. Callaway and Mr. Goodrich (R. 993). He was interrupted in this offer and not permitted to complete it. The Presiding Officer stated that §5(c) of the Administrative Procedure Act, *supra*, p. 14, refers exclusively to quasi-judicial matters and has no bearing on this proceeding (R. 993).[29]

The evidence should not have been excluded. Any presumption of official regularity was thereby rebutted. *Donnelly Garment Co. v. National Labor Relations Board*, 123 F.2d 215, 220, 224-5 (C.C.A. 8, 1941). Petitioner did all that was possible to show the irregularity of these proceedings. In *Powhatan Mining Co. v. Ickes*, 118 F.2d 105 (C.C.A. 6, 1941), the court said, at page 110:

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[29]See Specification of Error 3(e).

> "* * * *One who has been* denied access to information or *deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling.*"

Petitioner was thus cut off from completing its offer to show the relevance of such evidence (a) under §5(c) of the Administrative Procedure Act, and (b) under the requirements of judicial due process.

(a) Under §5(c) of the Administrative Procedure Act, investigating or prosecuting officials are prohibited from participating or advising in the decisions in this case.

§5(c) of the Administrative Procedure Act, *supra*, pp. 14-15, requires in its third sentence that:

> "* * * No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall * * * participate or advise in the decision * * * except as witness or counsel in public proceedings. * * *"

In *Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 227-8 (1943), the court said of the Food, Drug and Cosmetic Act:

> "The review provisions were patterned after those by which Congress has provided for the review of '*quasi-judicial*' orders of the Federal Trade Commission and other agencies, which we have many times had occasion to construe. * * * These considerations are especially appropriate where the review is of regulations of general

> application adopted by an administrative agency under its *rule-making power* in carrying out the policy of a statute with whose enforcement it is charged. * * *"

This case, decided prior to enactment of the Administrative Procedure Act, 1946, thus recognized that both *quasi-judicial*, or adversary, as contrasted with *rule-making* or non-adversary, orders and regulations may be issued under the Food, Drug and Cosmetic Act. The particular label placed upon a decision by an administrative agency is not conclusive. It is the substance of what the agency has purported to do and has done which is decisive. *Columbia System v. United States*, 316 U.S. 407, 417 (1942).

> "But overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect."
>
> *Powell v. United States*, 300 U.S. 276, 285 (1937).

As stated in *United States v. Abilene & So. Ry.*, 265 U.S. 274, 289 (1924):

> "Every proceeding is adversary, in substance, if it may result in an order in favor of one * * * as against another."

In enacting the Administrative Procedure Act, Congress recognized that there is a wide range of "rule-making" ranging from broad non-controversial matters to highly adversary proceedings. The Act was based on the Final Report of the Attorney General's Committee (1941), Sen. Doc. 8, 77th Cong., 1st Sess. In discussing rule-making that report stated, at pages 108-110:

"Hearings in rule-making are usually * * * investigatory * * *. The purpose is not to try a case * * *.

"Rule-making proceedings do occur, however, in which an adversary element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. * * * *Under these circumstances it may be desirable to* let affected parties *treat the rule-making proceedings as adversary*, so that all the information, conclusions, and arguments submitted to the agency may be *publicly* disclosed to opposing interests which may answer, explain, or rebut. * * *

"*Hearings of this type may be held * * * because of statutory requirements, as in the case of the Food and Drug Administration * * *.*"

Again, at page 56, the Committee Report stated:

"*Two characteristic tasks of a prosecutor are those of investigation and advocacy. It is clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision.* * * * Of course, *this may produce a state of mind incompatible with* the objective *impartiality* which must be brought to bear in the process of deciding. *For this same reason*, the advocate — *the agency's attorney* who upheld a definite position adverse to the private parties at the hearing — *cannot be permitted to participate* after the hearing *in* the making of *the decision. A man who has* **buried himself in one side of an issue** *is disabled from bringing to its decision that* **dispassionate judgment** *which Anglo-American tradition demands of officials who de-*

cide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide."

It was designed to avoid the three-fold combination of judge, jury, prosecutor, in one man. In the instant case the combination is four-fold, judge, jury, prosecutor, *and prosecuting witness*, all combined in one individual.

The Senate Committee which reported the bill condemned this practice, S. Rep. No. 752, 79th Cong., pp. 3, 17-18, and said:[30]

> *"The gist of the subsection is that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control* the operations of hearing and *deciding officers, except as a participant in public proceedings,* and even then in no different fashion than the private parties or their representatives. * * * *The exemption(s)* * * * *are* * * * *upon the theory that (they)* * * * *may be much like rule making. The latter,* of course, *is not subject to Section 5.* * * * *There are, however,* some *instances of either kind of case which tend to be accusatory in form and involve* **sharply controverted factual issues.** *Agencies should not apply the exceptions to such cases, because they are not to be interpreted as concluding* **fair procedure** *where it is required."*

Again at p. 30, Senate Report 752 stated:

> **"'* * * where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions'."**

This case involves "sharply controverted factual

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[30]Cf. Administrative Procedure Act, Legislative History, 79th Cong., S. Doc. 248, pp. 185, 203-4, 216.

issues." "Fair procedure" and "good practice" under §5(c) prohibit the witness and counsel from subsequently preparing, *ex parte*, the findings of fact and conclusions.

(b) Under constitutional provisions for judicial due process, investigating or prosecuting officials are prohibited from participating or advising in the decisions in this case.

Assuming, *arguendo*, that §5(c) is not mandatory, the minimal constitutional "rudiments" of fair play require a separation of judge, jury and prosecutor. As stated in a kindred problem, *Mahler v. Eby*, 264 U.S. 32, 44 (1924):

> *"We put this conclusion not only on the language of the statute but also on general principles of constitutional government."*

The rule is so clear that little authority is needed. An early Washington case states it well. In *Maitland v. Zanga*, 14 Wash. 92, 44 P. 117 (1896), the court held, at page 95, that:

> "* * * if this practice were to be tolerated, that the judge * * * would be compelled to pass upon the weight of his own testimony, * * * *considering the inclination of the human mind to attach more importance to its own statements than to those of others, it is easy to see that the rights of the litigants might be prejudiced in such a case.*"

Similarly, Jones on Evidence, 2d ed. (1908) §764, states that the practice of a judge testifying in a case before him is improper because he has to

> "pass upon the competency and weight of his own testimony."

The same principle extends to an arbitrator. See

Brocklehurst & Potter Co. v. Marsch, 225 Mass. 3, 8; 113 N.E. 646, 649 (1916), in which the court said:

> "'* * * Arbitration implies the exercise of the judicial function. An arbitrator ought to be free from prejudice and able to maintain a fair attitude of mind toward the subject of controversy. * * * *It is contrary to natural right and fundamental principles of the common law for one to judge his own cause'.*"

In *Berkshire Employees Ass'n. v. National Labor Relations Board*, 121 F.2d 235, 238-9 (C.C.A. 3, 1941) the court applied the principle to administrative agencies:

> "* * * It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled, is appointed to the bench and sits in the very case as judge. * * * *We conclude that in this case the facts, if proved, show a case which goes beyond the line of fair dealing with a particular litigant.*"

But even more pointedly in a parallel case involving almost identical facts, the practice was condemned by the Supreme Court in a subsequent phase of the earlier *Morgan* case, cited *supra*. *Morgan v. United States*, 304 U.S. 1, 14-22 (1938). "Rule-making" was also involved in that case fixing rates and practices for the future of certain market agencies, 304 U.S. 1, cf. Adm. Proc. Act, §2(c), *supra*, p. 13. Also in that case, as in this, there had been a court remand and a second hearing (*ibid.*, p. 14); many pages of transcript and of statistical exhibits (p. 16). As in this case appellants submitted briefs

to the Administrator but no briefs were "at any time supplied by the Government" (p. 16); findings were prepared in the bureau whose representatives had conducted the proceedings for the Government (pp. 17-18); the Secretary himself did not read all of the record but conferred with subordinates who had prepared the findings, conclusions and order (pp. 17-18). The court condemned this practice as being a denial of the

> "fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature." (p. 19)

It said:

> "* * * *If in an equity cause, a special master* or the trial judge *permitted the plaintiff's attorney to formulate the findings* upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and then adopted his proposals *without affording an opportunity to his opponent to know their contents* and present objections, *there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.*" (304 U.S. 19-20)

The court answered the "adjudication v. rule-making" contention by stating at page 20:

> "*It has regard to the mere form of the proceeding and ignores realities.* * * * The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. * * *"

and held that as the hearing was fatally defective, the order must be set aside.

The same reasoning is true here. If petitioner had been permitted to continue his cross-examination and to complete his offer of proof, the record would show that Mr. Callaway acted not only as witness and participated in cross-examination of industy witnesses, but that he and Mr. Goodrich further participated as judge or fact finder in the preparation of the findings, conclusions, and orders which were then signed by the Administrator, and Acting Administrator, respectively.

There is no intended reflection on the personal integrity of these able men. But it is necessary to consider "the inclination of the human mind to attach more importance to its own statements than to those of others," *Maitland v. Zanga, supra*, p. 85. Their resultant findings of fact have greatly prejudiced your petitioner in the instant case.[31]

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[31]This practice has been condemned by prominent counsel in other Food and Drug matters. See Best, *Practical Aspects of Cereal Food Standardization* (June, 1948), 3 Food Drug Cosmetic Law Quarterly 204, 212. Mr. Best is General Counsel of the Quaker Oats Company, and comments:

"* * * The standard is proposed by Departmental officials, presented by a Departmental attorney, supported by testimony of Departmental officials, and submitted to a Departmental hearing officer who reports his findings and conclusion back to the Departmental officials who proposed it. *The manufacturer would be naive indeed who would not have some misgivings about the effectiveness of this procedure to prevent arbitrary action.*" Also, see Austern, *Formulation of Mandatory Food Standards* (December,

The duty of the Administrator is "akin to that of a judge," *supra*, p. 78, to address himself to the evidence and upon that evidence to conscientiously reach the conclusions which he deems it to justify. It is flouted to its maximum degree when the very witness who testified and counsel who prosecuted may later prepare the findings based on their own testimony and necessarily partisan views.

If that be the law, then judicial review is a mockery and all that is required is for the witness-cross-examiner-opinion writer in his multiple capacity, first, to figure out the type of an order he wants; second, to take to the witness stand and testify that "in his opinion" such an order would meet the broad discretionary standards of the Act; third, sit down and write such an order based on his own testimony; and fourth, submit it to the Administrator for signature.

It must be repeated that broad principles are involved here, and no personalities as such. The dangers of such a rule are well described in Bell, *Let Me Find the Facts* (July 1940), 26 Am. Bar Ass'n Journal 552, quoting Chief Justice Hughes, that:

> "An unscrupulous Administrator might be tempted to say, 'Let me find the facts for the

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1947), 2 Food Drug Cosmetic Law Quarterly 532, 580. Mr. Austern is General Counsel for the National Canners Association and comments on the resultant tendency in such findings "to *write up* the evidence to support the decision and to *write down or disregard* the evidence the other way. * * * *This may be a form of advocacy, but it is hardly adequate finding* as to the facts of record."

people of my country and I care little who lays down the general principles'."

Similarly, Circuit Judge Curtis L. Waller (C.C.A. 5) recently declared:

> "Give me the right to fix the facts and you may have the right to declare the law." 17 Miss. L.J. 212, 219 (1945)

If the Food and Drug Administration's own employees may prepare proposed standards, testify as experts, and thereafter participate in draft of regulations, then judicial review can avail little.

But judicial review was intended to avail much. The author of the Food, Drug, and Cosmetic Act stated on the floor of the House:

> "We give more authority * * * under this bill than any *white man* ought to have *unless with it there is proper restraint* by the courts. That is what we have tried to do here (by provisions for judicial review)."[32]

The orders should be set aside as unlawfully made because investigating and prosecuting officials who participated in the trial as witness and counsel, thereafter in the absence of petitioner prepared the adverse findings of fact, conclusions, and orders which were subsequently signed by respondents without a conscientious consideration of the entire record.

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[32]83 Cong. Rec. 7776 (1938) Chairman Lea also referred specifically to the *Morgan* cases, *supra*, in indicating the scope of judicial review which the Food, Drug and Cosmetic Act was designed to afford. *ibid.* 9096 (1938).

B. The Findings of Fact and Conclusions of Law in Both Final Orders are Not Supported by Substantial Evidence. ***(See Specifications Nos. 6 to 50; supra, pp. 53 to 68).***

§10(e) of the Administrative Procedure Act, *supra*, p. 17, provides in part that in determining whether an order is supported by substantial evidence:

> "* * * the court shall review the whole record or such portions thereof as may be cited by any party."

The entire record has been certified and the Specifications just named have cited detailed portions thereof.

In *Staley Mfg. Co. v. Secretary of Agriculture*, 120 F.2d 258, 260 (C.C.A. 7, 1941) the court said:

> "* * * This court examines the evidence, not to make findings for the Secretary but to ascertain whether his findings are properly supported."

On rehearing, at page 261, the court added:

> "In effect petitioner complained that the Administrative fact finder did not consider the evidence in question. *Certainly the right to present evidence is a barren one if the trier of fact fails to consider it.*"

The Specifications allege such a failure to consider competent evidence.

(1) The findings are slanted and distorted in the *ex parte* manner of an advocate rather than the objective judgment of a dispassionate trier of the facts.

Specifications Nos. 6 to 50 have heretofore shown "as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."[32a] Portions of nearly every finding are shown

[32a]Rules, 9th Circuit Court of Appeals (Jan., 1948), Rule 20(d).

therein to be slanted and distorted in the manner of an advocate presenting *ex parte* conclusions rather than to be the objective findings and conclusions which due process require (Specifications Nos. 6-17, 19-30, 33-37, 39-41, 43-44, 46-50). This is the end result of an order made "without observance of procedure required by law" just considered. When findings and conclusions are prepared by the Administrator's principal witness and by his attorney who has "buried himself in one side of an issue", rather than by one of "dispassionate judgment", this result is inevitable. *Final Report of Attorney General's Committee, supra,* p. 83. Such "findings and conclusions" may be "a form of advocacy but it is hardly adequate *findings* as to the facts of record." Cf. *Austern, supra, n,* 31, p. 88.

To keep this brief within reasonable limits, petitioner will rely on its detailed Specifications heretofore made, and will avoid as far as possible restating, under Argument, facts and reasons already set out as particularly as may be above under Specification of Errors.

(2) The Presiding Officer improperly admitted uncorroborated hearsay or rumor which was subsequently relied upon in the findings and conclusions, and he improperly excluded pertinent rebuttal affidavits *(See specification Nos. 5(f) to (k), supra, pp. 51 to 53; No. 11, 57; No. 21, p. 60).*

The Food, Drug, and Cosmetic Act, §701(f)(3), *supra,* pp. 12-13, provides:

> "The findings of the Administrator * * *, if supported by *substantial* evidence, shall be conclusive."

In *Edison Co. v. Labor Board*, 305 U.S. 197, 229-30 (1938), the court said:

> "* * * Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. * * * *Mere uncorroborated hearsay or rumor does not constitute substantial evidence.*"

Illustrative is Specification No. 5(f). Petitioner objected that he had no opportunity to rebut a hearsay statement purportedly quoting a woman packer employed at a West Coast plant. The objection was overruled (Goding, R. 866). Fortunately, a representative of this West Coast packer was present at the hearing. He subsequently offered in affidavit form Exs. 37 to 44, of which Ex. 42 is the affidavit of this same woman packer, Mrs. Price. These proferred exhibits counteracted the alleged statement. Finding 16 refers to her reported hearsay statement (R. 866) in support of its finding, but omits to refer to the counteracting affidavits (App. B, p. 21).

The Administrator's Rules of Practice (1940), 5 F.R. 2379-80, §2.707(e), permit receipt of verified affidavits, but provide:

> "* * * the Secretary will consider the lack of opportunity for cross-examination in determining the weight to be attached to statements made in the form of affidavits."

If sworn affidavits are subjected to such a test, then, *a fortiori*, unsworn hearsay of third persons, particularly when thereafter directly contradicted by sworn affidavits, become "uncorroborated hearsay or rumor" and do not meet any test of reliability or necessity.

Exs. 37, 38, and 42 were admitted and rebut these hearsay statements in part (See photographs of excessively packed cans, Ex. 38, *Supp. Vol. II*). Exs. 39, 40, 41, 43, and 44 were equally relevant to rebut this hearsay but were improperly excluded (R. 1167-77). An exception was noted. They are set out in *Appendix F*, *totidem verbis*, and should have been admitted and considered in the findings.

Specifications Nos. 5(g) to (k) *supra*, pp. 51-3, are similar instances of unlawful admission of and reliance on hearsay, while concurrently disregarding probative evidence of petitioner. They are set out above in full detail, *supra*, pp. 52-3.

Specifications Nos. 11 to 13 and 21 relate in part to hearsay "reports" in Exs. 4 to 7, relied upon by the Administrator to sustain the order (App. A, pp. 4 and 9). Exs. 4 and 6 are self-serving interoffice communications, No. 4 soliciting information developed by No. 5, and No. 6 summarizing the Administrator's view of such information and eliciting further information, later, reported in No. 7.

Ex. 5 consists of 14 numbered pages, a one page chart, and 30 additional unnumbered pages. It is not verified or signed. It was offered by Mr. Callaway as purported "reports" of inspectors who were not otherwise identified or available for cross-examination. Mr. Callaway then, in turn, based sworn "opinion" testimony on his view of the contents of these "reports" (R. 30, 43-4).

Page 1 of Ex. 5 is illustrative. It "reports" an *unidentified* "Consumer Interview" by an *absent* field

inspector at an *unidentified* "retail store" shown only by an *unidentified* and *coded* symbol "SL #1", as to a *coded* and *unidentified* sample "FS 40964-H", reporting an *unidentified* and *coded* individual, "*Mr. C.*". "*Mr. C.*" is alleged to state that he "is not familiar with canned oysters" and that customers "*do not seem to know anything about the product.*" The next report is similar of a *coded* "*Mr. R.*" who is "not familiar with * * * canned oysters" and says "*the only reason the firm stocks grocery items is to suppress public opinion that his store is a 'liquor' store.*" The last item on page 1 is a *coded* "*Mr. V.*" who "isn't interested in this angle, *since his trade is restaurants and night clubs*".

It would be futile to encumber this brief with detailed references to the multitude of like succeeding "reports". What possible probative value can such reports have? And, if so, how could anyone rebut such anonymous statements, or "findings" or "opinions" based thereon?

In *Powhatan Mining Co. v. Ickes*, 118 F.2d 105, 107 (C.C.A. 6, 1941) an order of the Bituminous Coal Division was set aside because names were not "decoded so that the petitioners, for purposes of cross-examination, might know the *identity* of the producers who made the sales *and the other facts* surrounding the transactions."

Ex. 7 has all of the infirmities of Ex. 5, except that the names are given. But it so confuses canned shrimp and canned oysters that it is impossible to tell which is being referred to (See Mr. Callaway's admission of this, *supra*, pp. 33-4).

Such "uncorroborated hearsay" is not "substantial evidence" whether in documentary form (Specifications Nos. 11 and 21) or in oral form (Specifications Nos. 5(f) to (k)).

Congress so provided in enacting the Food, Drug, and Cosmetic Act. In House Report No. 2139, 75th Cong., p. 10, the Committee cited *Ohio Bell Tel. Co. v. Comm.*, 301 U.S. 292 (1937) and stated:

> "While common law rules of evidence need not be enforced, nevertheless it is *essential* to such a hearing that all of the evidence on which the administrative official acts be *disclosed at the hearing* and the right to controvert *viva voce* be accorded."

Administrative tribunals are not bound by technical rules of evidence:

> "* * * But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. * * *"
>
> *Int. Com. Comm. v. Louis. & Nash. R.R.*, 227 U.S. 88, 93 (1913).

The orders should be set aside as based upon "mere uncorroborated hearsay or rumor". *Edison Co. v. Labor Board, supra.*

(3) Work sheets underlying respondents' principal Ex. 33 show the latter to be honeycombed with error and contrary to respondents' sworn testimony given in purported reliance thereon. ***(See Specifications Nos. 26, 27, 42, supra, pp. 61, 66).***

A critical factual issue in this case is the validity of Finding 6 in the First Final Order that:

> "* * * there is no significant correlation be-

tween the incidence of (browning) * * * and the (increased) drained weight of oysters * * *."

Browning is a type of discoloration occurring in oysters protruding above the packing medium (App. A, p. 9). It varies from a faint tinge of yellow brown to the brown color of a Philip Morris cigarette package (R. 332). It is the most serious problem and chief source of complaint in the marketing of over-filled cans of oysters. It is comparable to the brown leaves on a head of lettuce. When a housewife sees such a product she automatically rejects it (Bailey, R. 731), because she thinks it has begun to spoil (R. 1143), although this is not correct. It is due to air coming in contact with oysters forced by overpacking above the packing medium (Bailey, R. 731).

Ex. 33 purports to report the Administrator's observation of degrees of such "browning" on 8 groups of 9 cans each, produced by various packers. The observation was made in every instance by Mr. Callaway (R. 931). Mr. Callaway said that he had adopted the same usage in classifying "browning" as Mr. Esveldt and Dr. Clough (R. 918). Sheets 2 and 3 thereof show Willapoint regular commercial 5 ounce pack (F.S. No. 79-142H and 79-145H). It reports 18 cans examined; "browning" is noted in *only one*. On the "authentic" or test pack of June 16, F.S. No. 79-144H, Code No. 194-E, with a drained weight range from 6.58 to 7.18 ounces, he likewise noted "slight browning" on *only one can* out of 9.

But the witness for the industry, Dr. Clough, examined 24 cans (Nos. 49-62, 64-74) from the same Code No. 194-E, packed on the same day by the same

inspector of Food and Drug from the same batch of oysters under identical conditions and having drained weights ranging from 6.40 to 7.49 ounces (Exs. 25, 27), and reported a "trace of browning" on *2 cans*, "slight browning" on *6 cans*, "medium browning" on *12 cans*, and "heavy browning" on *4 cans*, or "browning" in varying degrees on *all 24* of the overpacked cans which the Food and Drug inspector packed.

This wide difference in the *24* instances of browning reported by the scientist for the industry, Dr. Clough, on the Willapoint pack and the *1* instance reported by the witness for the Administrator, Mr. Callaway, on the Willapoint pack is entirely explained by the casual and arbitrary way in which Mr. Callaway actually classified browning.

This can be demonstrated by his testimony as to another pack. On direct examination, Mr. Callaway had stated (R. 821):

> "*These two samples* (18 cans, F.S. 79-141H and 79-118H) *represented* what, in my opinion, are *about as bad a condition of browning as I have seen in some time* * * *."

and that they showed a "*very considerable browning.*"

This testimony related to 18 cans packed by Northern Oyster Company under F.S. No. 79-141H (Ex. 33, p. 2). His "remarks" show "slight browning" on 2 cans and "medium browning" on 3 cans, out of 9 cans examined. On F.S. 79-118H, out of 9 cans examined, 5 cans showed "slight browning". The remainder were shown as "o.k." or "no defect noted".

Thus, out of a cut of 18 cans, there were 7 classified as having "*slight browning*" and 3 classified as

having "*medium browning*" and 8 had no notation at all of "browning."

When asked on cross-examination about certain of these cans and notations about them shown on the work sheets, Mr. Callaway stated that he classified these oysters as having only a "slight browning" even though he could see it through what was described as "browner liquid" (R. 945). Asked why he did not use the term "heavy browning", he replied:

> "I did not take the oyster out. If I had taken the oysters out and seen if they were heavy, I would have probably reported heavier." (R. 946)

But earlier he had reported on the work sheets the number of broken and twisted oysters in the can (R. 946), and he had previously said that he personally made the observations in each instance (R. 917-8).

Asked how he could make a report on the contents of these cans and know the precise number of oysters that were broken or twisted without taking them out of the can, he replied:

> "If that was reported, it certainly was not my report."

Denying that he was changing his testimony, the Presiding Officer interrupted to say:

> "I think we are getting unnecessarily involved here." (R. 946-7)

Asked whether a type of browning which was such that you could see it through liquid which is browner than other liquid should nevertheless be classified as slight, he replied:

> "Not necessarily." (R. 948)

He then explained that:

> "* * * I define slight browning as having two connotations. One: the depth of the color, and the other, the area of the oyster."

Asked whether that type of explanation goes to every use of the term "slight browning", he replied:

> "I cannot answer that question." (R. 948)

The findings make no reference to such inconsistencies on cross-examination. In *National Labor Relations Board v. Reeves Rubber Co.*, 153 F.2d 340, 342 (C.C.A. 9, 1946) this court cited with approval its ruling in *NLRB v. Union Pacific Stages*, 99 F.2d 153 (C.C.A. 9, 1938) quoting the following therefrom:

> "* * * The Board vaguely sanctioned certain statements of evidence by mingling them with its findings, without noting, as we have pointed out, that this evidence had been *changed* or *modified upon cross-examination*, or shown to be incorrect by other admitted or established facts * * *."

Respondents' Exhibit 33 is not reliable. It was modified and changed on cross-examination. It is at variance with the work sheets. In the absence of supporting work sheets it should be rejected. Under the circumstances, the orders are void in placing reliance thereon. (See Findings 2, 10, 12, 15, 17, 18; App. B., pp. 17-19; 21-2).

(4) The Presiding Officer erred in refusing to admit relevant work sheets on the ground that they were official files and might be considered by the Administrator, though not received in evidence. *(See Specifications Nos. 5(a) to (e), supra, pp. 50-1).*

Space limitations do not permit setting forth in full all of respondents' contradictory testimony with re-

spect to browning (R. 910-950). It is impossible for this court to appraise the integrity of Ex. 33 in the absence of the "supporting" work sheets which were shown in reality to be at marked variance with Ex. 33.

The petitioner sought repeatedly to have the work sheets placed in evidence in order to demonstrate these inconsistencies. Its requests were repeatedly refused (R. 1000-9).

The Presiding Officer excluded the work sheets on the ground that they were "official files" of the Administrator who could subsequently examine them as such and decide whether or not to place them in the record. This is reversible error.

§701(e), *supra, p.* 12, requires the Administrator to base his order *only* on substantial evidence:

"*of record* at the *hearing*." (*supra*, p. 12)

Nothing can be treated as evidence if not introduced as such. Papers in the Administrator's files are not evidence in a case. *United States v. Abilene & So. Ry. Co.*, 265 U.S. 274, 288 (1924). Facts conceivably known to the Administrator but not put in evidence will not support an order, *Chicago Junction Case*, 264 U.S. 258, 263 (1924); and may not be referred to or relied upon by the Administrator, *Sanders Bros. v. Federal Communications Comm.*, 106 F.2d 321, 326-7 (C.C.A., D.C., 1939); reversed on other grounds, 309 U.S. 470 (1940).

The Presiding Officer had previously insisted that petitioner furnish for the record its work sheets in support of its exhibits (See Specification No. 5(b)). His refusal of a like request of respondents was high-

ly prejudicial to petitioner, both in proceedings before the Administrator, and in resultant judicial review.

In *Powhatan Mining Co. v. Ickes, supra,* the court, in reversing an order of the Bituminous Coal Division, under like circumstances, held at p. 10:

> "* * * *a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling.*"

Both final orders should be set aside for the unlawful acts of withholding from the records, both before the Administrator and before this court on review, these underlying work sheets "supporting" Ex. 33.

(5) The Second Final Order is unlawful in refusing to receive into evidence certain cans of oysters. ***(See Specification No. 5(1), supra, p. 53-4).***

The previous sections indicate the extent of controversy over the "browning" and other impairments resulting from overpacking.

The Presiding Officer stated with respect to the terms "slight browning", "medium browning", and "heavy browning":

> "I think the Administrator can take official notice, and any court can take *judicial notice* that *this term* which we are now discussing extensively, and I might add, needlessly, *has no standard, no standard of specificity.*" (R. 913)

Mr. Callaway testified that there is no adaptable qualitative way of measuring the grades or degrees of browning (R. 913-15).

Petitioner therefore offered in evidence certain identified cans that had been packed in petitioner's plant by the Administrator's own inspector to yield intentionally an overpacked quantity. He proposed that every *even* or *odd* numbered such can (as the Administrator might elect) be opened and examined at the hearing room, and the remainder made available to this court as "part of the evidence". In view of the Presiding Officer's opinion of "judicial notice" that there is no "standard of specificity" the only way this court could view the tangible results of overpacking to determine whether the Administrator's finding thereon was "supported by substantial evidence", or was "arbitrary and capricious" was to see the evidence. The offer was refused (R. 1018-28, 1103-4).

The refusal of the offer was a denial of fair hearing and deprived this court of reviewing all of the evidence. It is reversible error.

Normally, an appellate court should not be burdened with real evidence or physical exhibits, particularly when an administrative agency is created to make requisite determinations with respect thereto. But this court, by Rule 18, has made especial provision for models, diagrams, and exhibits of material "*forming part of the evidence*" taken below. Other appellate courts have parallel rules. See Rules of the United States Supreme Court, Rule 18.

The record in this case shows that there is no other way whereby a court may ascertain with respect to these immeasurable qualities whether or not the find-

ings with respect thereto are in fact supported by substantial evidence without admitting the identified cans as a "*part of the evidence*" (R. 1026).

It was prejudicial error to reject the offer of proof of these identified cans.

(6) Finding of Fact No. 7 of the First Final Order, as amended by Finding No. 2 of the Second Final Order, is not supported by substantial evidence in finding that "blanched oysters are practically indistinguishable from those prepared from oysters that have been pre-steamed in the shehll" (*See Specifications Nos. 33 to 37, supra, pp. 62-4).*

This finding of fact is directly contrary to Ex. 28 and Appendix B thereof and to Ex. 30. (See App. E of this brief, pp. 41-3, 47-50, 53).

The finding is critical in this case. Petitioner's blanched oysters are the finest product ever marketed and more closely approximate the natural flavor of fresh oysters than any canned oysters in history (Bailey, R. 724). Southern packers also gave undisputed testimony with respect to a similar process which they were forced to abandon in 1942 because of requirements to over-fill their cans beyond the 5 ounce drained weight. This is the maximum quantity that either region of the industry can pack to fill a can of fresh opened oysters (*supra*, p. 36).

The opinion evidence with respect to taste qualities of such fresh opened and blanched oysters includes Mr. Callaway's statement that the two different products are "indistinguishable" (R. 802), as contrasted with his own earlier acknowledgment of superiority

of the fresh opened product (R. 46), and the statements of industry officials of both the Western and Southern oyster industries who testified repeatedly that they were far superior (Bailey, R. 724; Holcombe, R. 554-5; Carriere, R. 453-4).

It is appropriate first to examine the nature of the study which Mr. Callaway made to support his statement that:

> "* * * the oysters prepared for canning by the blanching process such as employed by Willapoint Oysters, Inc., were indistinguishable from presteamed oysters in odor, taste and appearance * * *. That was our opinion." (Callaway, R. 800)

He stated that he made an organoleptic examination (R. 809). An organoleptic examination is a test by use of the organs or senses, *i. e.*, taste, odor, and appearance. When properly done it is an accepted method of analyzing food.

The methods which Mr. Callaway used were so widely at variance with standard technique that a statement of the accepted method was set out in petitioner's brief submitted to the Administrator prior to its determination of the case (*Supp. Vol. III, pp. 13-14*). It was ignored. It quoted *McGraw-Hill Series in Food Technology, Flavor*, by E. O. Crocker (1945), Chapter 11, Organoleptic Technique, "Example of Quantitative Organoleptic Work", p. 98, which summarizes a standard method in part as follows:

> "* * * *The tasting was done in an established manner, without swallowing*, in ¾ oz. sips, after each of which *the mouth was rinsed* with lukewarm water. *All findings were written down se-*

> *cretly* and scored to the nearest whole point; *then the score sheets were turned over to a secretary for tabulation* and averaging."

This procedure should be contrasted with the casual method employed by Mr. Callaway:

(a) No established procedure was followed in sampling. The various participants in the organoleptic examination "may have skipped around" in examining the different cans (Callaway, R. 893);

(b) No regular sequence was followed. Some smelled one first, others smelled others first. Some examined one first, others examined others first (Callaway, R. 896);

(c) No record of any kind was made as to the organoleptic examinations conducted by the participants as to taste or odor (R. 893). Mr. Callaway used a spoon. He "couldn't say exactly" what the others did (R. 894);

(d) No separate scoring was made of the results of the examination by any of the participants (Callaway, R. 898);

(e) No rinsing of the mouth was done between the sampling of various specimens, although Mr. Callaway testified that:

> "* * * (In) any number of cases it is customary to wash the mouth out between tasting, where there is a very strong tasting * * * involved * * *." (R. 894-5)

(f) The only record of any kind is "what appears on the (work) sheets". The work sheets were not offered in evidence and did not make any report on taste or odor (Callaway, R. 893). Ex. 33 makes no

references of any kind to flavor or taste of any canned oysters;

(g) The "opinion" testimony as to taste was all based on recollection (R. 898-9);

(h) But later Mr. Callaway said he "doesn't remember" what one participant's opinion was. He doesn't "recall exactly what" another participant's opinion was, and as to a third, he does not "remember discussing this in detail with" him. He does remember that he discussed it with one other man, and:

> "* * * I *just happened to remember* that he and I both thought it was largely affected by the salt content." (R. 907); and

(i) Mr. Callaway admitted that it is possible in an organoleptic examination for one member or participant to influence the judgment of other participants (Callaway, R. 952). The other participants were all subordinate officials who performed this work under Mr. Callaway's direction (R. 891, 1012, 1014).

It is amazing to your petitioner that this agency, having administered a Food and Drug Act since 1906, would presume to support their conclusions on a matter of such vital interest to an industry on such a casual and random study. It is nothing short of utterly arbitrary and capricious, and voids the orders made in reliance thereon.

Although the entire act is to advance the "interest of consumers" (*supra*, p. 11), the *only* consumer evidence was totally ignored. It remains only to consider that evidence.

Ex. 28 reports a Consumer Acceptance Test made

by three competent and impartial women at Mary Cullen's Cottage. The Cottage has complete facilities for preparing, cooking, and serving food. These facilities were used in conducting the Panel. The participating women included the Director of the Cottage, the Assistant Director who had been so employed for 12 years, and is a graduate of Oregon State College, Home Economics Department, with a Food Major, and has had past experience managing restaurants, and the third member was a relatively new employee selected as a typical housewife (App. E, pp. 42-3). It is operated by the Oregon Journal, Portland, Oregon, in conducting its regular women's page feature covering home service activities. Neither petitioner nor any of its associates knew any of these persons nor has ever had any contact with the Oregon Journal (R. 742-3).

Three different brands of oysters were purchased at random in Portland grocery stores. The labels were first removed and the cans were identified to the Panel members only by number. No. 1 was the *steam-opened Western* oysters known as Denco brand. No. 2 was the *blanched Western* oysters known as Willapoint brand. And No. 3 was the *steam-opened Southern* oysters, known as Tropical brand (App. E, pp. 42-3).

These three brands were prepared in two typical dishes, oyster stew and fried oysters, using standard cooking recipes. The Panel members made orderly, independent and separate notations of quality of each brand with respect to appearance, texture and flavor of the oysters, and of the broth flavor of the

oyster stew, and of the appearance, texture and flavor of the fried oysters prepared from each different sample (App. E, pp. 43-4; Callaway, R. 898).

The court's attention is particularly invited to these detailed comments (App. E, pp. 47-8):

The *steam-packed* Western oysters (No. 1), prepared for stew, were variously described by Panel members as "slightly chemical but not upleasant", "strong and a chemical flavor", and "salty, both broth and oyster strong chemical flavor." The Tropical brand of *Southern* oysters (No. 3), prepared for stew, was described as "strong and metallic, leaves bad after taste", "strong flavor and somewhat stale", and "strong and slight stale taste". But the Willapoint *blanched* pack (No. 2), prepared for stew, was successively described as "very good—with a fairly fresh flavor—has true oyster flavor", "good full flavor but mild", and as "good flavor, mild".

Again, the three brands were prepared by standard recipe as fried oysters. The No. 1 or *steamed* pack Western oysters were described as "slightly chemical flavor that hid much of oyster taste", "definite chemical flavor", and "strong salty taste but good". The Tropical brand of Southern oysters (No. 3) were described as "poor flavor except for breading, would hardly recognize that these were oysters", "lacking in flavor", and "very little oyster flavor". But the Willapoint *blanched* oysters (No. 2) were again described as "good oyster flavor with a fresh taste", "good full mild flavor", and "mild flavor, very good".

The summary for each was that No. 2 (Willapoint) was "better in many respects in both the stew and

fried products", "had best flavor, full yet not strong", and "No. 2 best oyster of three but No. 1 best looking before cooking." (See Ex. 30, App. B, p. 53 *re* nectar).

Although the Administrator had recognized that such evidence would be highly probative and should be offered "in the interest of consumers", and although he had given specific instruction to his Field Agent to have a Consumer Acceptance Test made of the different brands of oysters, he did not offer any such evidence. The inspector stated that he did not have time to accomplish this (R. 1104-5).

But when petitioner offered such probative evidence as to the "interest of consumers", the Administrator completely ignored the testimony.

This raises the question:

> Should this court in the exercise of judicial review, set aside an order which is arrived at: "by accepting part of the evidence and totally disregarding other convincing evidence"?

In *National Labor Relations Board v. Union Pacific Stages*, *supra*, this court answered that question at p. 177:

> "* * * But the courts have not construed this language (that findings if supported by evidence shall be conclusive) as compelling the acceptance of findings arrived at *by accepting* part of the evidence *and totally disregarding other* convincing evidence."

The order should be set aside for totally ignoring convincing evidence by competent industry witnesses proving the superiority of quality in petitioner's pack. Cf. *U.S. v. Lord-Mott Co.*, 57 F. Supp. 128 (D.C., Md., 1944).

(7) The First Final Order is unlawful because there is no substantial evidence to support the findings of fact, conclusions and order, that the name of Western oysters when canned is "Pacific Oysters", while concurrently finding that the name of Southern oysters when canned is "Oysters" ***(See Specification Nos. 6 and 18, supra, pp. 53 and 58).***

Finding No. 1 (App. A, p. 2), cites 9 references to the record. R. 33-35 is based on the hearsay Exhibit No. 5, discussed *supra*, p. 94, and states that the Western species "*might* be called" *gigas* and is "*usually*" known as the Pacific Oyster; and that the *ostrea virginica* species is "*often known*" as Cove Oysters; and it distinguishes between "Eastern Oysters" and "Pacific Oysters" with no reference to the name of either when canned. R. 156-8 states that the *ostrea virginica* crosses with a variety of that species and is "*called the Cove Oyster*" which is found in the Gulf. It identifies the *ostrea gigas* type simply by its Latin name. R. 161 differentiates between the Pacific *Coast* oyster and the Eastern oyster. R. 178-9 again use the same terms. R. 523 refers to the Pacific Coast oyster industry in a geographic sense rather than in a sense restrictive to labeling. No pertinent testimony appears on R. 524-5, or on R. 535. R. 536 is cross-examination by counsel for the Administrator and refers to "Southern Oysters", "Atlantic Oysters" and other geographical names. R. 537 makes no reference.

On the other hand, the finding omits to state that throughout the record the *ostrea virginica* oyster when canned is identified by Mr. Callaway as the "Southern" or "Cove" oyster at least 14 times (R. 19, 20, 35, 37, 38, 52, 61-2, 63-4, 67, 88, 479, 485, 486,

487). It omits to refer to the one label which Mr. Warren, counsel for the Administrator, requested be read into the record during the entire hearing. The label read:

"TILLAMOOK BRAND FANCY SELECT
OYSTERS
CONTENTS 5-OUNCES OYSTER MEAT",

distributed by Haines Oyster Company, Pier 67, Seattle 1, Washington (R. 634). It omits to refer to the apparent familiarity of counsel for the Administrator with the fact that the "common or usual name" of both species of oysters when canned to be labeled as "Oysters." Mr. Warren asked, at page 179:

> "At the present time, are not a considerable portion of Pacific Coast canned oysters simply designated as *Oysters?*"

At the second hearing Mr. Goodrich, counsel for the Administrator, offered only *one* label, Ex. 31, which is petitioner's label. He brought out that this label has been continuously used for the past 16 years. Over all the years, petitioner's canned product has been so labeled as "OYSTERS" and not as "Pacific Oysters".

The truth of the matter is that for "shorthand" purposes of identification, the *ostrea virginica* species of canned oysters is variously termed as Southern, Cove, Atlantic, Eastern, Gulf, and other local names. And, by the same token, the *ostrea gigas* type is for the same purpose variously termed Western, Pacific Coast, West Coast, Pacific, Willapa, Tillamook, and other similar shorthand identifying names.

But basically "oysters is oysters" when canned, just

as "pigs is pigs". It is submitted that the only 2 labels of record and the long-continued practice of the industry to term the Western product "OYSTERS" when canned, speak louder than unsupported "opinion" as to "the common or usual name so far as practicable."

(8) Both Final Orders are unlawful in relieving Southern packers of their burden of proof and in imposing upon Western packers an improper burden of proof. (*See Specification of Errors No. 5(m), supra, p. 54).*

The Administrative Procedure Act §7(c) (*supra*, p. 15), provides in part:

> " * * * the *proponent* of a *rule* or *order shall have* the *burden* of *proof*."

The 1944 order (App. C, pp. 28-9) had found:

> "It is entirely practicable under existing cannery practices for canneries on the Atlantic Coast and Gulf Coast to pack oysters * * * "

to a drained weight of 7½ ounces, and that:

> "Such a fill can be met in commercial practice without unreasonable difficulty and without damage to the product."

Since 1942, southern producers voluntarily packed such a 7½ ounce fill (*supra*, p. 22). Prior to the 1947 hearings, the Southern oyster industry made application to the Administrator to call a hearing on its "proposal to amend the fill * * * so as to lower the required drained weights," stating that the quality of their pack "is injured by the fill now required" (Ex. 6, *supra*, p. 29).

The Southern industry thus was the "proponent of a rule" to reduce the fill. Under §7(c) they had the

burden of proof on their "proposals * * * to lower the required drained weight." Nevertheless, in the 1947 hearing, the Administrator himself assumed the burden of proof for the Southern oyster industry by first producing his own witnesses (R. 12-13 to 150) and by making voluntarily a proposal to reduce the drained weight on Southern oysters from standards theretofore found reasonable.

The House report on the Administrative Procedure Act, H. R. Rep. No. 1980, 79th Cong., p. 36, in commenting on §7(c) said:

> "That the proponent of a rule or order has the burden of proof means *not only that the party initiating the proceeding* has the general burden of coming forward with a prima facie case *but* that *other parties, who are proponents of some different result, also* for that purpose *have a burden to maintain.* * * * "

Almost identical language is contained in Senate Report No. 752, at page 22.

Although the Southern industry had a continuing burden of proof as proponent of a rule to lower its drained weight, it did not offer any supporting statistical evidence or any experimental packs to sustain the burden that should have rested upon them as to proposals to *lower* the drained weight (*supra*, pp. 35-6, 44).

Concurrently, the Administrator proposed *increased* fill requirements for Western oysters (Callaway, R. 37-8). The Western industry met the burden thus shifted to them, both by scientific testimony and by detailed statistical evidence of experimental packs of

Western oysters showing rapid deterioration of quality when subjected to increased drained weights (R. 150-447b, 564-627; Exs. 14-20; *supra*, pp. 34-5).

Subsequently, in the second hearing, respondents, having refused petitioner's application for further hearing on blanched Western oysters (*Orig. Vol. I, items 1 and 2*) until directed to do so by this court's order of June 8, 1948, again unlawfully imposed a new burden of proof on petitioner, construing it to be "proponent of a rule" (*supra*, pp. 37-8). Petitioner reserved this question, but again assumed the burden and proceeded with detailed oral proof and supporting scientific data and exhibits (*supra*, pp. 39-43).

But such burden was unlawfully imposed on petitioner because it was the Administrator and not petitioner who was "proponent of the rule" to *increase* drained weights for large oysters above the long established 5 ounce standard.

In *Van Camp Sea Food Co. v. United States*, 82 F.2d 365, 373 (C.C.A. 3, 1936), the court said:

> "As we have said, the burden of proving its case by more than a mere preponderance of testimony rested on the government, and this burden, in our opinion, it did not meet; and this not only from a consideration of what was shown by the government's proof, but also by what it might have shown but which it did not. * * * "

Thus, in the first hearing the Southern oyster industry was granted an unlawful *preference*, and in the second hearing the Western industry was subjected to an unlawful *prejudice* in that the Administrator twice improperly shifted the burden of proof,

first by voluntarily relieving the Southern oyster industry of its burden of proof as to its own proposal to lower standards of fill theretofore found reasonable for small Southern oysters, and second by imposing on petitioner a burden which was the Administrator's to justify his proposal to increase long continued standards of fill for Western oysters.

Both final orders are unlawful in shifting the burden of proof and should be set aside for those reasons.

C. Both Final Orders Are Unlawful in Being in Excess of Statutory Jurisdiction. ***(See Specification Nos. 51 to 54, supra, pp. 69 to 70).***

§401 of the Act, *supra*, p. 11, authorizes the Administrator to promulgate a *reasonable* standard of identity for any food "under its common or usual name so far as practicable." The Administrator in Finding 1 (App. A, p. 2), found that:

> "Oysters of the species *ostrea gigas, commonly known* as 'Pacific Oysters,' are canned * * * ."

This finding is defective in not containing the requisite "quasi-jurisdictional" findings in the language of the statute. It makes no sufficient finding of the "common or usual name *so far as practicable*" as to require that petitioner's long established practice be abandoned. Such a finding "is essential to the existence of authority to promulgate the rule." *United States v. B. & O. R. Co.*, 293 U.S. 454, 463-4 (1935); *Mahler v. Eby*, 264 U.S. 32, 44 (1924); *United States v. Chicago, Milwaukee, etc.*, 294 U.S. 499, 510 (1935).

The orders are void because they prescribe an *un*"reasonable" standard of identity that is *not* supported by the evidence.

§401 further authorizes the Administrator to promulgate *reasonable* standards of fill. It is submitted that in the light of the foregoing criticisms of the evidence, it must necessarily follow that the statutory mandate of a "reasonable standard of fill" has not been satisfied and that the orders must be set aside as being in excess of statutory jurisdiction.

D. Both Final Orders Are Void as Being an Abuse of Discretion and Arbitrary and Capricious. ***(See Specification Nos. 4(a) to (e), 55 to 57, pp. 48 to 50, 70 to 72).***

These allegations relate to the rejection of evidence, to the refusal to grant motions for further hearing, to the manifestations of bias, and to the studied design by which the Administrative agency has given credence to the testimony of its own side of the evidence and has ignored substantially all of the evidence of petitioner and other Western packers of oysters.

Bias, not in any invidious personal sense, but in the legal sense of prejudging the case, was first apparent when the Administrator denied Mr. Mitchell's request on behalf of petitioner for a further hearing (*Orig. Vol. I, Item 6*). Mr. Mitchell's brief, filed in February 1948 before the First Final Order became effective, set forth in substantial detail the reasons why the order should be reviewed (*Orig. Vol. I, Item 7*, pp. 1-27, dated February 5, 1948). Respondent Ewing, in his reply of March 10, 1948, stated:

> "I have given careful consideration to your requests * * * ."
>
> "In support of your application for another hearing you offer to present new evidence * * * .

> The substance of this offer is that many canners now are packing Pacific oysters without presteaming, using only a short blanching; that with such blanched oysters it is necessary to use a put-in weight of 9¾ ounces * * * ; and that the use of such a put-in weight would impair the quality of the canned oysters.
>
> "Even if such evidence were in the record, I am convinced that the fill proposed in the tentative order should be adopted * * * ."

Respondent Ewing then reasoned that since test packs showed that raw oysters could be packed to a 9¾ ounce fill, the same should be true of blanched oysters. He disregards the facts of browning, distortion, and disfiguration, and all of the arguments advanced by Mr. Mitchell.

It was again demonstrated in the urgency with which the Administrator denied petitioner's petition for a further hearing with respect to its new blanching process or, in the alternative, for a temporary stay to permit of judicial review (*Orig. Vol. I, item 1*). He stated:

> "This order already has been long delayed to the detriment of the public and canners in other areas to permit representatives of Pacific canners every opportunity to present data that is relevant and material to a reasonable order. I do not believe that any reason exists for further delay."

In *Continental Box Co. v. National Labor Relations Board*, 113 F.2d 93, 95-6 (C.C.A. 5, 1940), the court, although sustaining the Board on the facts there presented, effectively quoted this passage from literature:

> "In the colloquy over the forthcoming trial of Rebecca, Sir Walter Scott makes the parties to it say—'I ordered the hall for his judgment seat.' 'What,' said Bois Guilbert, 'so soon?' 'Aye' replied the Preceptor, 'the trial moves rapidly on when the judge has determined the sentence beforehand'."

By thus prejudging the matter he, of necessity, placed himself and his subordinates in a position where "face saving," if nothing else, effectively dictated that after this court had remanded the proceeding and after evidence had been taken, they should arrive again at the same result. This result they accomplished in their findings "with studied design" by giving "credence to the testimony" of the Administrator's witnesses on direct examination, and by ignoring much of their testimony on cross-examination and "the evidence given by" petitioner.

A recent parallel case is *Pittsburg S.S. Co. v. National Labor Relations Board,* 167 F.2d 126, 128-9 (C.C.A. 6, 1948). The court said:

> " * * * *it is contrary to human experience that all witnesses on one side* of a case *are falsifiers while those on the other side are all truthful* * * * . * * * *'If an administrative agency ignores all the evidence given by one side* in a controversy, *and with studied design gives credence* to the testimony of *the other side, the findings would be arbitrary* and not in accord with the legal requirement'."

The orders should be set aside as being an abuse of discretion and arbitrary and capricious.

E. Both Final Orders Are Unlawful as Being Contrary to Constitutional right. ***(See Specification Nos. 58 and 59, supra, pp. 71 and 72).***

The contentions that the orders are a taking of property without due process of law rest upon the foregoing showings as to (a) an arbitrary lack of procedural due process, and (b) capricious requirements made without being supported by substantial evidence that petitioner (1) package oysters in such an excessive quantity as to destroy its established customer acceptance, and (2) relinquish its long-continued usage of the term "oysters," which term would be conferred by the orders exclusively upon the Southern producers with whom the Administrator has found your petitioner to be in competition.

See *Morgan v. Nolan*, 3 F. Supp. 143 (S.D. Ind., 1933), aff'd *Nolan v. Morgan*, 69 F.2d 471 (C.C.A. 7, 1934); *N.L.R.B. v. Phelps*, 136 F.2d 562, 563, Note 1 (C.C.A. 5, 1943).

CONCLUSION

Petitioner has shown that the First and Second Final Orders are not in accordance with law and void because they are: (a) made without observance of the procedure required by law; (b) unsupported by substantial evidence; (c) in excess of statutory jurisdiction; (d) arbitrary, capricious, and an abuse of discretion; and finally, (e) contrary to constitutional right.

It is respectfully submitted that petitioner's prayer should be granted for an order permanently setting aside and annulling and perpetually enjoining the

First Final Order of the Administrator, and the Second Final Order of the Acting Administrator, dated, respectively, March 10, 1948, and August 3, 1948, entitled "Docket No. FDC-50, *In the Matter of Establishing Definitions and Standards of Identity and Amending the Standard of Fill of Container for Canned Oysters.*"

Respectfully submitted,

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Dated at Seattle, Washington, October 23, 1948.

APPENDICES A TO F, INCLUSIVE, FOLLOW

APPENDICES "A" to "F"

APPENDIX A

[Published in Federal Register, March 13, 1948, 13 F.R. 1337-1339]

TITLE 21 — FOOD AND DRUGS

Chapter I—Food and Drug Administration, Federal Security Agency

(Docket No. FDC-50)

PART 36—SHELLFISH; STANDARDS OF IDENTITY AND FILL OF CONTAINER.

CANNED OYSTERS

In the matter of establishing definitions and standards of identity and amending the standard of fill of container for canned oysters.

Final order. By virtue of the authority vested in the Federal Security Administrator by the provisions of the Federal Food, Drug, and Cosmetic Act (secs. 401, 701; 52 Stat. 1046, 1055; 21 U.S.C., 341, 371), and on the basis of the evidence received at the above-entitled hearing duly held pursuant to notice issued on June 6, 1947 (12 F.R. 3726); upon consideration of the exceptions filed to the tentative order issued by the Federal Security Administrator on October 4, 1947 (12 F.R. 6699) and granting those relating to identity and denying those relating to fill of container, as may be seen by comparison of this order with the tentative order, the following order is hereby promulgated.

DEFINITIONS AND STANDARDS OF IDENTITY

Findings of fact.[1] 1. Oysters are canned commercially in the United States on the Atlantic, Gulf, and Pacific coasts. The oysters on the Atlantic and Gulf coasts are of the species *Ostrea virginica.* (They are often referred to as "Eastern Oysters.") The common name of oysters of this species, when canned, is "oysters" or "Cove Oysters." Two species, *Ostrea gigas* and *Ostrea lurida,* are grown on the Pacific Coast. Oysters of the latter species, known as "Olympia Oysters," are not now commercially canned, but this is due to economic reasons, and oysters of this species are suitable for canning. Oysters of the species *Ostrea gigas,* commonly known as "Pacific Oysters," are canned in considerable quantities. (R. 33, 35, 95, 156-158, 161, 178-179, 523-525, 535,536-537)

2. Pacific oysters are much larger, are somewhat more tender, and easier to break or tear, than Eastern oysters. The methods used for canning Eastern oysters and Pacific oysters are essentially the same. The basic procedure is described in finding 3. (R. 8, 31, 52, 95, 158, 162, 174, 523-524, 526)

3. Oysters in the shell are steamed until the shell opens. The partially cooked oysters are removed from the shells, washed to remove extraneous matter, such as sand, pieces of shell, etc., and packed into containers. Water is added to fill the container, leaving only a small head space. Such water is known as a

[1]The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing, which are the basis for these findings.

"packing medium." Salt may be added for seasoning. The containers are sealed and processed by heat to prevent spoilage. (R. 31-32, 48-49, 97-101, 109-111, 116-117, 134, 517-519)

4. Eastern oysters are commonly canned whole. Sometimes the large sizes of Pacific oysters are cut into two or more pieces before canning and sometimes pieces resulting from breaking and tearing oysters are segregated and canned together. Some oysters are broken and torn in removing them from the shells and some in washing and in packing into containers. During processing and subsequent handling of the canned product small pieces of the outer surface of the oysters often break off. When oysters are canned as they come from the shuckers, without cutting, they are commonly designated by the name "Oysters." When pieces of oysters resulting from the tearing and breaking of oysters are segregated and canned they are commonly designated by the name "Pieces of Oysters." When oysters are cut into two or more pieces they are commonly designated by the name "Cut Oysters." The designations "sliced" and "diced" have sometimes been used but are not appropriate, since the oyster does not lend itself to cutting into slices or cubes, and if so cut the slices and cubes lose their shape in processing and subsequent handling. (R. 34-35, 41, 49-52, 69-71, 88-89, 110, 185, 269-270, 288, 417-419, 459-470, 477-486)

5. Canned Eastern oysters and canned Pacific oysters are sold in the same trade channels. Generally speaking, consumers distinguish between them on the

basis of the difference in size. The canned Eastern oysters being smaller are generally used for oyster stews. The Pacific oysters being larger may be used for frying or for stews. (R. 17-21, 67, 75, 95, 158, 417-418, 445-446, 519, 524, 526, 532, 534-537, 624; Ex. 4, 5, 6, 7)

6. Canned oysters consist of cooked oysters in a watery liquid. The proportion of oysters to liquid depends largely on the quantity of oysters placed in the container before the packing medium is added. The watery liquid surrounding the oysters contains salt and soluble material extracted from the oysters. It has an oyster taste and is useful in making oyster stews, but is usually discarded if oysters are used for frying, although it may be used for food in some other way. This liquid is less valuable than the oysters. (R. 31-32, 42, 52(a), 76, 167-170, 447-447(a), 454, 513, 525-526, 535-536, 624, 625)

7. Occasionally oysters for canning are not steamed prior to removal from the shell. Such raw oysters, after washing, are packed directly into the container with or without packing medium, and the container sealed and processed. Even if no packing medium is added to the raw oysters, a watery liquid separates from them during processing. Raw oysters may be blanched and packed into containers with the liquid in which they are blanched as a packing medium, or with additional water and salt. Sometimes the liquid draining from cleaned shell oysters during the presteaming is collected and used, with or without added water and salt, as a packing medium. (R. 31-32,

39-42, 45, 49, 52-54, 55-57, 76, 78, 123-125, 134, 165-166, 168-169, 180-181, 453-454, 457, 513, 519, 523-524, 532, 553, 555).

8. The flavor of canned oysters is influenced by the canning procedure used, but the final canned product in all cases is a mixture of cooked oysters and watery liquid. The processes described in finding 7 are suitable unless the product contains too much liquid and too little oysters. The quantity of oysters in a container, however, is more properly related to the fill of container than to identity. (R. 31-32, 42, 45-46, 76, 524, 532, 553, 555)

Conclusion. Based on the foregoing findings of fact it is concluded that it will promote honesty and fair dealing in the interest of consumers to adopt a definition and standard of identity for canned oysters as follows:

§36.5 *Canned oysters; identity; label statement of optional ingredients.* (a) Canned oysters is the food prepared from one or any mixture of two or all of the forms of oysters specified in paragraph (b) of this section, and a packing medium of water, or the watery liquid draining from oysters before or during processing, or a mixture of such liquid and water. The food may be seasoned with salt. It is sealed in containers and so processed by heat as to prevent spoilage.

(b) The forms of oysters referred to in paragraph (a) of this section are prepared from oysters which have been removed from their shells and washed and which may be steamed while in the shell or steamed

or blanched or both after removal therefrom, and are as follows:

(1) Whole oysters with such broken pieces of oysters as normally occur in removing oysters from their shells, washing, and packing.

(2) Pieces of oysters obtained by segregating pieces of oysters broken in shucking, washing, or packing whole oysters.

(3) Cut oysters obtained by cutting whole oysters.

(c) (1) When the form of oysters specified in paragraph (b) (1) is used, the name of the food is "Oysters" or "Cove Oysters," if of the species *Ostrea virginica;* "Pacific Oysters," if of the species *Ostrea gigas;* "Olympia Oysters," if of the species *Ostrea lurida.*

(2) When the form of oysters specified in paragraph (b) (2) is used, the name of the food is "Pieces of ———," the blank being filled in with the name "Oysters" or "Cove Oysters," if of the species *Ostrea virginica;* "Pacific Oysters," if of the spcies *Ostrea gigas;* "Olympia Oysters," if of the species *Ostrea lurida.*

(3) When the form of oysters specified in paragraph (b) (3) is used, the name of the food is "Cut ———," the blank being filled in with the name "Oysters" or "Cove Oysters," if of the species *Ostrea virginica;* "Pacific Oysters," if of the species *Ostrea gigas;* "Olympia Oysters," if of the species *Ostrea lurida.*

(4) In case a mixture of two or all such forms of

oysters is used, the name is a combination of the names specified in this paragraph of the forms of oysters used, arranged in order of their predominance by weight.

STANDARD OF FILL OF CONTAINER

Findings of fact.[2] 1. Conservation Order M-81 of the War Production Board, effective in 1942, required, among other things, that canned oysters be packed in cans of certain sizes, the smallest of which was the No. 1 picnic can, 2-11/16 inches in diameter and 4 inches high. It also required that the No. 1 picnic can of oysters be filled to yield a cut-out weight of not less than 7½ ounces. These requirements with respect to canned oysters remained in effect until 1946. (R. 67, 94, 204, 443, 448, 544, 550)

2. The standard of fill of container for canned oysters issued under authority of the Federal Food, Drug, and Cosmetic Act, effective February 23, 1945 (9 F.R. 14008), requires a drained weight of oysters of not less than 68 per cent of the water capacity of the container (7½ ounces for the No. 1 picnic can), where the average drained weight per oyster is less than ½ ounce. There is no requirement in such standard for drained weight in case the canned oysters are of larger size. (R. 16, 36-38, 65-66, 94; Ex. 3)

3. Canned oysters packed on the Atlantic and Gulf coasts are generally of such size as to be subject to

[2]The citations following each finding of fact refer to the pages of the transcript of the testimony and the exhibits received in evidence at the hearing, which are the basis for these findings.

the requirements of the standard of fill of container. Since the latter part of 1942 they have been so packed as to yield a drained weight of 7½ ounces for the No. 1 picnic can, with drained weights for other cans in proportion. The increased fill made necessary by Conservation Order M-81 and by the standard of fill of container under the Federal Food, Drug, and Cosmetic Act, caused some minor manufacturing difficulties and some changes in the character of the canned oysters. The food contained much less liquid; sometimes the oysters tended to stick together in the can; possibly they were slightly softer. (R. 17, 30, 44, 94-97, 126, 131-133, 139, 204, 451-453, 457-458, 459, 461-463, 466-467, 480, 481, 485-486, 493-494, 513, 519, 546-547, 551-552, 556, 562, Ex. 3)

4. Pacific oysters were not canned in any significant quantity while the requirements of Conservation Order M-81 with respect to canned oysters were effective, but canning was resumed in 1946. Most of the canned Pacific oysters, on account of their large size, are not subject to the requirements of the existing standard of fill of container for canned oysters, and when canning was resumed they were generally packed to yield the cut-out weight in use prior to 1942. The cans so packed were not well filled with oysters. (R. 17, 63-64, 78-81, 125-126, 150, 161, 177, 178, 192, 204, 265, 390-391, 418, 431-432, 443, 621, 634-635; Ex. 3, 8)

5. Soon there appeared on sale in the same market areas, canned Pacific oysters in No. 1 picnic cans with cut-out weights of slightly over 5 ounces of oys-

ters, and from the Atlantic and Gulf coasts canned oysters in the same size cans with cut-out weights of 7½ ounces of oysters. The canned Pacific oysters were often labeled to show the total weight of oysters and liquid in the can but not the drained weight of oysters. The difference in the amounts of oysters present was known to wholesale dealers, but was not generally known to retail dealers or to the final purchasers. This is a condition likely to confuse and deceive consumers. (R. 17-21, 62, 64, 67, 93-94, 125-126, 133, 158, 444-446, 633, 634; Ex. 4, 5, 6, 7, 21)

6. There has been no commercial canning of Pacific oysters where cans were filled to capacity with oysters, and it is impossible on the basis of commercial experience to determine the maximum fill of such oysters which can be used without impairment of quality. Experimental packs sponsored by canners of Pacific oysters were said by representatives of the canners to show impairment of quality at any point over the fill in use prior to 1942. Conditions of canned oysters described as "browning," "pressure," and "deformities" were selected as the factors of quality for judging these packs, and a certain number of "demerits" were assigned to each condition. The assignment of "demerits" was made on an arbitrary basis and was not shown to be reasonably related to trade or consumer concepts of quality.

"Browning" is a type of discoloration occurring in oysters protruding above the packing medium. It is related to the amount of entrapped air in the can at the time of closure. Excessive entrapped air can be

avoided in good manufacturing practice. This type of discoloration is not as noticeable as other discolorations commonly found on canned Pacific oysters, particularly yellow spots known as "liver spots," and black areas on the mantle of the oysters.

"Pressure," as the term was used is evidenced by a flat area on an oyster where it has been pressed tightly against the lid of the can. This flattened area is not unsightly and does not affect the cooking quality of the oyster.

"Deformities" as a quality factor are of the following four types: "Twisting" refers to distortion of the shape of the oyster. It results from an oyster occupying a twisted position in the can. A "broken" oyster is an oyster from which a substantial segment has been completely severed, each portion being in the can. A "torn" oyster is one from which such a segment is partly, but not completely, separated. "Pieces" of oysters are oyster segments.

Except in the case of the condition called "pressure," there is no significant correlation between the incidence of these conditions and the drained weight of oysters, when the per cent of oysters showing defects is considered instead of the sum of "demerits" per can. It appears possible that there may be some correlation between the number of "twisted" oysters and increasing drained weight, but in the results reported it is not statistically significant.

Analysis of the data submitted by representatives of the canners of Pacific oysters on the experimental packs prepared by them shows that such oysters can

be packed to yield a cut-out weight of at least 6½ ounces in the No. 1 can without significant impairment of the quality of such oysters. (R. 44, 193, 204, 214-219, 238-251, 252-253, 267, 271-278, 279-409, 526-529, 538, 566-602, 620, 625, 653-700; Ex. 14 (A), (B), (C), (D); 15 (A), (B), (C); 16 (A), (B), (C), (D), (E); 17, 18, 19, 20, 21)

7. Presteaming or blanching, or any other heat treatment of raw oysters, causes them to lose water so that with heat-treated oysters a lesser put-in weight than with raw oysters is necessary to obtain a drained weight of 6½ ounces. Put-in weights of as high as 11 ounces of raw Pacific oysters can be packed into the No. 1 eastern oyster can, which after processing yield drained weights of 6½ ounces or more, without impairment of quality due to the fill. (R. 38, 39, 56, 125, 126, 163, 164; Ex. 12)

8. Experimental packs of Pacific oysters made by the Food and Drug Administration showed that it is possible to can Pacific oysters so as to comply with the standard of fill of container now applicable to canned oysters of an average drained weight of less than ½ ounce, without substantial increase in the incidence of "pressure," "deformities," and discoloration, including "browning," and without other substantial change in quality from that of the commercially canned Pacific oysters having a much lower drained weight. (R. 37-38, 67, 93, 107, 114-115, 120, 121, 125-126, 630, 631, 638, 639, 640, 642, 653-700; Ex. 9 (A), (B), (C); 10 (A), (B), (C); 11 (A) to (Q), inclusive; 12)

Conclusions. It would not promote honesty and fair dealing in the interest of consumers to so reduce the requirements of the present standard of fill of container for canned oysters as to return to the fill in use prior to 1942.

It would not promote honesty and fair dealing in the interest of consumers to make separate standards of fill of container for canned oysters of different sizes or for oysters of different species.

On the basis of the evidence of record and the foregoing findings of fact it is concluded that, by using any of the heat treatments given raw oysters before packing into the can, a 6½-ounce drained weight from the No. 1 can can be obtained without impairment of the quality of canned Pacific oysters.

On the basis of the evidence of record and the foregoing findings of fact and conclusions, and taking into account the differences between commercial canning and experimental canning, it is concluded that a standard of fill of container that will promote honesty and fair dealing in the interest of consumers is a standard based on drained weight of oysters, applicable to oysters of all sizes and species in cans of various sizes, requiring that the drained weight of oysters be not less than 59 per cent of the water capacity of the can.

Wherefore, it is ordered, That paragraphs (a) and (b) of §36.6 be deleted and that there be substituted therefor a new paragraph (a) as follows:

36.6 *Canned oysters; fill of container; label statement of substandard fill*: (a) The standard of fill of

container for canned oysters is a fill such that the drained weight of oysters taken from each container is not less than 59 per cent of the water capacity of the container.†

Paragraphs (c), (d), and (e) of §36.6 are hereby designated as paragraphs (b), (c), and (d), respectively.*

Effective date. The regulations and amendments hereby promulgated shall become effective on the ninetieth day following the publication of this order in the FEDERAL REGISTER.

(Secs. 401, 701, 52 Stat. 1046, 1055; 21 U.S.C. 341, 371)

Dated: March 10, 1948.

OSCAR R. EWING, *Administrator.*

(F.R. Doc. 48-2227; Filed, Mar. 12, 1948: 8:49 a.m.)

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†The arithmetic of translating percentage figures of drained weight into the 6½ ounce fill or other fills can be roughly computed by assuming for approximate purposes the standard size can to have 11 ounces. Thus, applying percentage figure of 68% to 11 ounces, equals 7.48 ounces; 64% of 11 ounces, equals 7.04 ounces; *59% of 11 ounces, equals 6.49 ounces*; 46% of 11 ounces, equals 5.06 ounces.

*The prior text of §36.6 which is herein amended by this order is set out in Appendix C, *infra*, pp. 31-3.

APPENDIX B

[Published in Federal Register, August 12, 1948, 13 F.R. 4663-4664]

TITLE 21 — FOOD AND DRUGS

Chapter I—Food and Drug Administration, Federal Security Agency

[DOCKET NO. FDC-50]

PART 36—SHELLFISH; DEFINITIONS AND STANDARDS OF IDENTITY; QUALITY AND FILL OF CONTAINER

CANNED OYSTERS

In the matter of establishing definitions and standards of identity and amending the standard of fill of container for canned oysters.

Final order; supplemental findings of fact, conclusions, and order. By virtue of the authority vested in the Federal Security Administrator by the provisions of the Federal Food, Drug, and Cosmetic Act (secs. 401, 701; 52 Stat. 1046, 1055; 21 U.S.C. 341, 371), and on the basis of evidence received at a public hearing held at the direction of the United States Circuit Court of Appeals for the Ninth Circuit beginning on July 7, 1948, the following findings of fact, conclusions, and order are made:

DEFINITIONS AND STANDARDS OF IDENTITY

Findings of fact. 1. Finding 6[1] is modified so that the second sentence shall read: The proportion of oysters to liquid in the finished food depends on the

[1]This refers to a finding in the order promulgating a definition and standard of identity for canned oysters and amending the standard of fill of container therefor, published in 13 F.R. 1337.

quantity of oysters placed in the container before packing medium is added and on the extent to which such oysters have been precooked by pre-steaming in the shell or blanching after removal from the shell (R. 728, 977).

2. Finding 7 is modified by adding the following at the end thereof:

At the commencement of the 1947-1948 canning season, Willapoint Oysters, Inc., and other canners of Pacific oysters, began the commercial practice of preparing oysters for canning without pre-steaming in the shell.[2] Oysters were purchased as raw shucked oysters or were shucked at the canneries. They were, after washing, immersed in a hot brine solution, the salt content of which ranged from approximately 3 to 10 per cent, and blanched in the hot brine for a period from 30 to 60 seconds. After removal from the brine solution, the oysters were washed in fresh water, cooled, and held in warm water until they were ready to be placed in the cans. The cans, after filling with a put-in weight of approximately 7½ oz. of blanched oysters, a salt tablet and water, were sealed and processed by heat, using the regular cannery procedure. When this blanching method of preparation is em-

[2]The method used by Willapoint Oysters, Inc., was worked out by Mr. R. H. Bailey, president of the firm, in the kitchen of his home using a pressure cooker and a hand closing machine. He furnished no data as to the maximum fill obtainable, and despite one year's experience with the method, no attempts, experimental or commercial, have been made to increase the fill beyond 5 ounces drained weight. (R. 713, 751, 767-770, 776, 1037-1038)

ployed, or when modified methods are used, the treatment of oysters in the boiling brine solution causes the raw oysters to lose water and soluble solids into the brine solution. This loss approximates 16% by weight from the raw oysters. Such loss is not significantly different from the loss which occurs when Pacific oysters are subjected to a light pre-steaming in the shell. After processing in the can, the canned oysters prepared from blanched oysters are practically indistinguishable from those prepared from oysters that have been pre-steamed in the shell, although blanched oysters have a slightly different flavor and the liquid drained from canned oysters that have been prepared for canning by blanching has more fine particles of oyster material in suspension than does similar liquid drained from cans prepared after pre-steaming the oysters in the shell. (R. 713-716, 773, 800, 803, 811-815, 820-826, 829, 844-845, 847-848, 875, 902-906, 1144-1147, Ex. 33)

STANDARD OF FILL OF CONTAINER

Findings of fact. The following findings of fact are made in addition to those forming part of the order previously promulgated (13 F.R. 1337):

9. Pacific oysters prepared for canning by the blanching method are no better than canned Pacific oysters prepared for canning by pre-steaming in the shell. A substantial segment of persons in the industry and large scale purchasers regard them as inferior because of the material suspended in the liquid and because the oysters are more tender and break more readily. Willapoint Oysters, Inc., the principal pro-

ducer of canned oysters prepared for canning by the blanching method has not differentiated canned oysters prepared from blanched oysters from canned oysters prepared from pre-steamed oysters either by labeling, advertising, or merchandising representations. No changes in labeling have been made by any canners using the blanching method in order to inform purchasers of canned oysters of the method used in preparing their oysters for canning. The same labeling is used for pre-steamed and for blanched oysters. (R. 757, 760, 800, 803, 824, 847-848, 878-882, 1057, Ex. 23, 24, 31)

10. In order to attain a given drained weight of canned oysters, the changes which take place in the oysters during the preparation for and in the canning process must be taken into account. The most significant change is the loss of liquid and the cooking of the oyster meats when oysters are subjected to heat treatment. The total quantity of liquid which separates, based on the weight of raw oysters, is approximately the same whether the oysters are packed into the can raw, given partial cooking in boiling salt water prior to placement in the can (as occurs in the blanching process), or partly cooked in the shell by steaming. (R. 38, 55, 163, 826, 877, 1129 1143-1144 Ex. 11(g), 11(e), Ex. 33)

11. When raw oysters are used to fill the can and no water is added as a packing medium, all of the liquid draining from the oysters because of heat treatment is retained in the can and forms the packing medium. This results in the maximum retention of

oyster flavor, but the liquid in the can after processing is quite murky, and this is objectionable to many purchasers. To attain a drained weight of approximately 7 ounces from the No. 1 EO can, it is necessary to put in approximately 11 ounces of raw Pacific oysters. (R. 32, 41, 124, 722-723, 784, 848, 1046)

12. During the blanching process such as described in modified finding 7 under Identity, the raw oysters are partly cooked and lose some liquids. The loss in weight is approximately 16%.[3] As a result of this loss of liquid during blanching, there is less loss in the can during processing than with raw oysters. To attain a drained weight of 7 ounces from the No. 1 EO can, a lesser put-in weight is required than for raw oysters, *i.e.*, about 9½ ounces are necessary with the degree of cooking during the blanching process employed by Willapoint Oysters, Inc. To attain a drained weight of 5 ounces using similarly blanched oysters a put-in weight of only 7½ ounces is necessary. This quantity of blanched oysters does not fill the can. Water is added to the blanched oysters in the can to serve as part of the packing medium; it fills space in the can not filled with oysters. The lower put-in weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water. (R. 825-826, 830, 854, 859-866, 869-871, 875, Ex. 33)

13. When the practice of pre-steaming oysters in the shell is used, it is customary to steam them suf-

[3]By variations of salinity of brine, temperature and time of heating, the loss of liquid may be as great as, or even greater than, with pre-steaming. (R. 768, 771, 826, 877, 907, 1042, 1062, 1129, 1143)

ficiently to cause the shells to open. This is an economical method of opening oysters prior to removal from their shells. When this practice is employed there usually is a slightly greater loss of liquid than occurs in blanching. As a result there is slightly less liquid lost in the can during heat processing than with blanched oysters. Using Pacific oysters that have been pre-steamed enough to cause the shells to open, a put-in weight of about 9 ounces in the No. 1 EO can is needed to give a drained weight of approximately 7 ounces. Canned oysters prepared from pre-steamed oysters have less of the original oyster flavor than when raw oysters are used, and slightly less oyster flavor than when blanched oysters are used. The difference is more pronounced as between the liquids. It is a common practice for canners of oysters on the Gulf and Atlantic coasts to pre-steam somewhat more than do canners of Pacific oysters. With heavily pre-steamed oysters, the meats are cooked more in the shells and are subject to less loss of liquids in the can, in fact, in many instances a put-in weight of around 7½ ounces will yield a drained weight of approximately 7 ounces. Water is added as a packing medium. (R. 718, 824, 829, 847, 978, 1039, 1054, 1062)

14. The put-in weight of oysters, because of variable losses which occur in the can during processing, is not an accurate measure of fill of container for canned oysters. It would be a reasonably accurate measure if all oysters were pre-cooked to the same degree before weighing into the cans. (R. 178, 877, 977, 979, 1062, 1143-1144)

15. The liquid draining from oysters as a result of heating has food value and flavor. But it is of much less value to the consumer than is the meat of the oyster. The liquid drained from canned oysters, except where oysters without any blanching or presteaming are used, comes largely from the water added by the canner as packing medium. The smaller the put-in weight of oysters, the more water is added by the canner to form a packing medium. (R. 781, 827, 831, Ex. 28, 33)

16. Canned oysters which yield from the No. 1 can a drained weight of 5 ounces are slack-filled.[4] As the drained weight of oysters is increased above 5 ounces, up to 7 ounces, only minor difficulties are encountered by the canner. No new equipment is necessary; no change in canning procedure is required. It is only necessary for the employees filling the empty cans to place more oysters in those cans as they start down the packing line. It may be necessary to use more care to prevent salt tablets from bouncing out of the cans. Sometimes a portion of the top oyster is clipped off by the sealing operation. This frequently occurs with a fill designed to yield 5 ounces drained weight but the relative incidence of clipping between a fill designed to yield 5 ounces and one devised to yield 6½ ounces is not shown by the record. (R. 775, 779, 786, 803, 806, 808, 823, 832, 848, 854, 861, 866, 869, 871, 875, 908, 1113, 1115, 1117-1124, Ex. 32)

17. The factors of quality in canned oysters that are most important to consumers are not disclosed by the record. The appearance factors discussed in the record

[4]This is very graphically shown by Exhibit 32.

and referred to as twisted and broken oysters, browning, and pressure are factors which were emphasized by a committee appointed by Pacific oyster canners to show why they should not be required to increase the fill of container that has been used by them. Except for pressure, the other conditions—twisted and broken oysters and browning—occur regularly in cans filled to yield 5 ounces drained weight. With slack-filled cans, the condition called pressure naturally is not encountered. Based on the number of oysters showing these defects, there is no real difference between canned oysters filled to yield 5 ounces of drained weight and those filled to yield 6½ ounces drained weight whether oysters were pre-steamed or blanched. On a can basis, the can with more oysters tends to have more damaged oysters than a can with fewer oysters, since the percentage of oysters damaged in the canning procedure is about the same without respect to fill. (R. 204, 214-218, 785, 786, 881, 912, 918, 983-985, Ex. 19, 33)

18. Except for slight differences in flavor and appearance, the food value of the liquid packing medium taken from canned oysters is approximately the same in cans having the same drained weight of oysters, regardless of method of preparing the oysters for canning. As drained weight increases, the quantity of liquid packing medium decreases. This decrease is due to less water being added to fill empty spaces in the can before sealing. The flavor and food value of the liquid packing medium, however, is inversely proportional to the amount of water added as a packing medium. (R. 823, 830, Ex. 33)

Conclusions. The following additional conclusions

are made on the basis of the evidence of record and the foregoing findings:

There is no basis for making separate standards of fill of container for canned oysters based upon the method of preparing oysters for canning.

It will not promote honesty and fair dealing in the interest of consumers to base the fill of container requirement for canned oysters on the amount of oyster meat put into the can before processing, or on the method used in preparing oysters for canning.

It will promote honesty and fair dealing in the interest of consumers to base the fill of container requirements on the drained weight of oysters and to require the same drained weight whether the oysters used were packed into the can raw or were blanched or were pre-steamed in the shell before placement in cans.

A reasonable requirement for canned oysters packed with the blanching process which will promote honesty and fair dealing in the interest of consumers is that the drained weight of oysters be not less than 59% of the water capacity of the can.

It is ordered, That no change be made in the definition and standard of identity for canned oysters or in the standard of fill of container established by my final order of March 10, 1948.

(Secs. 401, 701, 52 Stat. 1046, 1055; 21 U.S. C. 341, 371.)

Dated: August 3, 1948.

J. DONALD KINGSLEY,
Acting Administrator.

[F.R. Doc. 48-7279; Filed, Aug. 11, 1948; 8:52 a.m.]

APPENDIX C

[Published in Federal Register, November 25, 1944; 9 F.R. 14008-9]

TITLE 21 — FOOD AND DRUGS

Chapter I—Food and Drug Administration
Federal Security Agency

[DOCKET NO. FDC - 42]

PART 36—SHELLFISH: DEFINITIONS AND STANDARDS OF IDENTITY; QUALITY; AND FILL OF CONTAINER

STANDARDS OF FILL OF CONTAINER FOR CANNED OYSTERS

By virtue of the authority vested in the Federal Security Administrator by provisions of the Federal Food, Drug, and Cosmetic Act (52 Stat. 1046, 1047, and 1055, 21 U.S.C. secs. 341, 343(h)(2) and 371), the Reorganization Act of 1939 (53 Stat. 561 ff., 5 U. S.C. sec. 133-133v), and Reorganization Plans No. I (53 Stat. 1423) and No. IV (54 Stat. 1234); and upon the basis of evidence of record at the hearing duly held pursuant to notice issued on July 20, 1944 (9 F.R. 8192), and no objection having been filed to the proposed order published on October 20, 1944 (9 F.R. 12657-9), the following order is hereby promulgated:

FINDINGS OF FACT

1. On May 27, 1912, the Secretary of Agriculture, to facilitate the enforcement of the Food and Drugs Act of 1906, issued an announcement known as Food Inspection Decision 144 with regard to fill of containers for canned foods. This announcement was general in terms and pertinent provisions stated in substance that in canned food products the can serves not only as a container but also as an index to the quantity of food therein; that the can should be as full of food as

practicable for packing and processing without injuring the quality or appearance of contents; and that when food is packed with water, brine, etc., the can should be as full of the food as practicable and should contain only sufficient liquid to fill the interstices and cover the product.

2. On February 19, 1914, after extended investigation the Bureau of Chemistry of the Department of Agriculture, which had charge of the administration of the Food and Drugs Act of 1906, issued a Service and Regulatory Announcement designated S.R.A., Chemistry 1. This announcement contained among other provisions the following:

> 3. *Weights of Oyster Meat Required in Cans of various sizes.*—This notice is issued to inform the trade that pending further investigation the weights agreed upon by the canners at their meeting in Washington, in October 1912, will be regarded by the board as satisfactorily fulfilling the requirements of Food Inspection Decision No. 144. It is expected, however, that the "cut-out" weight of all cans shall conform with this agreement, and where a variation occurs it shall be as often above as below the agreed weight. The weights which have been agreed upon are given below.

—SIZE OF CAN—		*Weight of drained*
Diameter	*Height*	*oysters "cut-out"*
Inches	*Inches*	*Ounces*
2 11/16	2¾	3
2 11/16	3 6/16	4
*2 11/16	*4	*5
3⅜	3 15/16	8
3⅜	4 9/16	10

*No. 1 so-called Standard (or Picnic, or E.O., or Campbell's Soup size) can.[1] See *supra*, Brief P.....

3. The drained weights prescribed by this announcement are from 42% to 49% of the estimated water capacity of the respective cans.

4. Cans of oysters filled to the minima prescribed by the announcement are only about two-thirds full of oysters. When so filled, the cans contain a smaller quantity of oysters than consumers expect from the size of the container. This percentage of fill is much below that found in other canned foods generally.

5. Prior to 1928 all oyster canneries in this country were located along the Atlantic Coast and the Gulf Coast. In 1928 oyster canning was begun on the Pacific Coast. At present oyster canneries are situated principally on the South Atlantic and Gulf Coasts and the Northwest Pacific Coast.

6. The oysters canned on the Atlantic Coast and Gulf Coast are for practical purposes the same type but those canned on the Pacific Coast are of different species, and are considerably larger in size.

7. After the shell oysters are delivered to the cannery it is the practice of some canneries to wash them. The procedure in all canneries thereafter is essentially the same. The oysters are placed in baskets or cars and then in a retort or steam box and steamed (or precooked, as it is sometimes called). After steaming they are shucked, washed, and drained, sometimes graded, and filled into the cans by hand. Each can is filled with a predetermined weight of oysters, brine or water and a salt tablet are added, and the cans are sealed by machine and then processed by heat to prevent spoilage of the product.

8. The steaming causes the shells to open and thus permit easy shucking, at the same time the oyster meat loses liquid and shrinks in both size and weight.

Until the maximum shrinkage is reached, increased time or temperature of steaming increases the shrinkage. The time and temperature of steaming varies in different canneries and at different times in the same cannery, depending on a number of factors such as the amount of shrinkage the canner desires and the difference of composition of the oysters.

9. In general, Pacific Coast canneries do not steam to the same extent as Atlantic and Gulf canneries. In Atlantic and Gulf packed oysters there is usually a slight gain in weight during processing in the can, whereas in Pacific packed oysters a considerable part of the total shrinkage takes place in the processing with a consequent loss of weight.

10. Considerable experimental work has been done in recent years by the Food and Drug Administration on Atlantic Coast and Gulf Coast canned oysters for the purpose of establishing a fill of container standard. Very little experimental work has been done by the Administration on Pacific Coast canned oysters, the principal reason being that none have been packed there since 1942.

11. It is entirely practicable under existing cannery practices for canneries on the Atlantic Coast and Gulf Coast to pack oysters so that the drained weight of oysters taken from each can will be at least 68% of the water capacity of the container. Such a fill can be met in commercial practice without unreasonable

difficulty and without damage to the product. When so packed, the cans are reasonably full of oysters and such a fill would protect consumers from slack filling of the containers.

12. Pacific Coast canners have not packed oysters commercially since 1942. They have in the past packed oysters in only two different size cans, to wit, the No. 1 can, so-called, the dimensions of which are 2-11/16 inches in diameter and 4 inches in height and which has a water capacity of 10.9 ounces avoirdupois; the No. 1 tall salmon can, so-called, the dimensions of which are 3-1/16 inches in diameter and 4-11/16 inches in height and which has a water capacity of 16.6 ounces avoirdupois. It has been the practice of Pacific Coast oyster canners to pack the No. 1 can to give a drained weight of 5 ounces and to pack the No. 1 tall salmon can to give a drained weight of 8 ounces. There are usually from 4 to 8 oysters in the No. 1 can, the maximum number being 10, to give the 5-ounce drained weight. There are usually from 7 to 13 oysters in the No. 1 tall salmon can, the maximum number being 15, to give the drained weight of 8 ounces. The average drained weight per oyster of Pacific Coast canned oysters is at least ½ ounce and is usually more.

13. Atlantic Coast and Gulf Coast canned oysters vary in size, their drained weight averaging from about 4 oysters per ounce to about 13 oysters per ounce.

14. Standards of fill of container for canned oysters in terms of percentage of water capacity of containers are generally more satisfactory than in terms of

ounces per can of each size, because they would encompass any size of can, including sizes not often used.

15. A satisfactory and accurate method of determining the drained weight of canned oysters is as follows:

Keep the unopened canned oyster container at a temperature of not less than 68° or more than 95° Fahrenheit for at least 12 hours immediately preceding the determination. After opening, tilt the container so as to distribute its contents evenly over the meshes of a circular sieve which has been previously weighed. The diameter of the sieve is 8 inches if the quantity of the contents of the container is less than 3 pounds, and 12 inches if such quantity is 3 pounds or more. The bottom of the sieve is woven-wire cloth which complies with the specification for such cloth set forth under "2380 Micron (No. 8)" in Table I of "Standard Specifications for Sieves," published March 1, 1940, in L.C. 584 of the U. S. Department of Commerce, National Bureau of Standards. Without shifting the material on the sieve, so incline the sieve as to facilitate drainage. Two minutes from the time drainage begins, weigh the sieve and the drained oysters. The weight so found, less the weight of the sieve, shall be considered to be the drained weight of the oysters.

16. A satisfactory and accurate method for determining water capacity of containers is set forth in §10.1(a) of Title 21, Code of Federal Regulations, Cumulative Supplement.

17. When canned oysters fall below the standard of fill of container, a label statement which is satisfac-

tory and which fairly and accurately informs the consumer of that fact is the general statement of substandard fill specified in §10.2(b) of Title 21, Code of Federal Regulations, Cumulative Supplement, followed by the statement: "A can of this size should contain — oz. of oysters. This can contains only — oz.," the blank spaces being filled in with the applicable figures.

CONCLUSIONS

1. There is insufficient evidence in this record to warrant the findings of fact on which to base a standard of fill of container when drained weight of oysters in a particular can averages ½ ounce or more per oyster.

2. Promulgation of the regulation hereinafter prescribed, fixing and establishing a standard of fill of container for canned oysters, will promote honesty and fair dealing in the interest of consumers.

Wherefore, the following regulation is hereby promulgated:

§36.6 *Canned oysters; fill of container; label statement of substandard fill.* (a) The standard of fill of container for canned oysters when the drained weight of the oysters in the can after processing averages less than ½ avoirdupois ounce per oyster is a fill such that the drained weight of oysters taken from each container is not less than 68 per cent of the water capacity of the container.

(b) For the purposes of this section canned oysters means oysters packed into containers which are then sealed and processed by heat to prevent spoilage.

(c) Water capacity of containers is determined by the general method provided in §10.1(a) of this chapter (21 CFR, Cum. Supp., 10.1).

(d) Drained weight is determined by the following method:

Keep the unopened canned oyster container at a temperature of not less than 68° or more than 95° Fahrenheit for at least 12 hours immediately preceding the determination. After opening, tilt the container so as to distribute its contents evenly over the meshes of a circular sieve which has been previously weighed. The diameter of the sieve is 8 inches if the quantity of the contents of the container is less than 3 pounds, and 12 inches if such quantity is 3 pounds or more. The bottom of the sieve is woven-wire cloth which complies with the specifications for such cloth set forth under "2380 Micron (No. 8)," in Table I of "Standard Specifications for Sieves," published March 1, 1940, in L.C. 584 of the U. S. Department of Commerce, National Bureau of Standards. Without shifting the material on the sieve, so incline the sieve as to facilitate drainage. Two minutes from the time drainage begins, weigh the sieve and the drained oysters. The weight so found, less the weight of the sieve, shall be considered to be the drained weight of the oysters.

(e) If canned oysters fall below the standard of fill of container prescribed in paragraph (a) of this section, the label shall bear the general statement of substandard fill specified in §10.2(b) of this chapter (21 CFR, Cum. Supp.), in the manner and form therein specified, followed by the statement, "A can of this

size should contain — oz. of oysters. This can contains only — oz.," the blanks being filled in with the applicable figures.

(52 Stat. 1046, 1047, and 1055, 21 U.S.C., secs. 341, 343 (h) (2) and 371; the Reorganization Act of 1939, 53 Stat. 561 ff., 5 U.S.C., sec. 133-133v; and Reorganization Plans No. I, 53 Stat. 1423, and No. IV, 54 Stat. 1234.)

The regulation hereby promulgated shall become effective on the ninetieth day following the date of publication of this order in the FEDERAL REGISTER.

Dated: November 18, 1944.

(Seal) PAUL V. MCNUTT, *Administrator.*

[F.R. Doc. 44-17945; Filed, Nov. 24, 1944; 11:39 a.m.]

APPENDIX D

FOOD INSPECTION DECISIONS[1]

By the United States Department of Agriculture, Bureau of Chemistry[2]

Board of Food and Drug Inspection; approved by Secretary of Agriculture,[3]
Issued May 22, 1912[3]

"*No. 144. Canned Foods: use of water, brine, syrup, sauce, and similar substances in the preparation thereof.*—The can in canned food products serves not only as a container but also as an index of the quantity of food therein. It should be as full of food as is practicable for packing and processing without injuring the quality or appearance of the contents. Some food products may be canned without the addition of any other substances whatsoever—for example, tomatoes. The addition of water in such instances is deemed adulteration. Other foods may require the addition of water, brine, sugar, or syrup, either to combine with the food for its proper preparation or for the purpose of sterilization—for instance, peas. In this case the can should be packed as full as practicable with the peas and should contain only sufficient liquor to fill the interstices and cover the product.

"Canned foods, therefore, will be deemed to be adulterated if they are found to contain water, brine, syrup, sauce, or similar substances in excess of the amount necessary for their proper preparation and sterilization.

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[1]Compiled in *Dunn's Food and Drug Laws* (3 Vol.) First Edition, 1927-8, published by United States Corporation Company, page 139.

[2]*Dunn, supra*, n. 1, Vol. 1, page 139.

[3]*Dunn, supra*, n. 1, Vol. 1, page 201.

"It has come to the notice of the Department that pulp prepared from trimmings, cores, and other waste material is sometimes added to canned tomatoes. It is the opinion of the Board that pulp is not a normal ingredient of canned tomatoes, and such addition is therefore adulteration. It is the further opinion of the board that the addition of tomato juice in excess of the amount present in the tomatoes used is adulteration—that is, if in the canning of a lot of tomatoes more juice be added than is present in that lot, the same will be considered an adulteration."

REGULATORY ANNOUNCEMENTS BY UNITED STATES DEPARTMENT OF AGRICULTURE, BUREAU OF CHEMISTRY

Opinions of General Interest Regarding Questions Arising under the Food and Drug Act, etc.[4]
Issued February 19, 1914.[4]

No. 2. "Weights of clam meat required in cans of various sizes.—Food Inspection Decision No. 144 states that in canned food products the can serves not only as a container but also as an index of the quantity of food therein. It should be as full of food as is practicable for packing and processing without injuring the quality or appearance of the contents, and such products as require the addition of brine, water, etc., for proper preparation should contain only sufficient liquid to fill the interstices and cover the product.

"The board has received many inquiries from canners of clams regarding the weight of clams which cans should contain in order to comply with the *requirements* of the above decision. The subject has, therefore, been investigated by the Bureau of Chem-

[4] *Dunn, supra,* n. 1, Vol. 1, page 21:

istry. As a result of this investigation it is the opinion of the Board that cans which contain the weights of drained clam meat shown below will satisfactorily fulfill the requirements of Food Inspection Decision No. 144. These weights are 'cut-out' weights; i.e., the weights of meat left in the can after all free liquor has been drained off.

Type of Can	Diameter *Inches*	Height *Inches*	Cut-Out Weight of Clams *Ounces*
No. 1 regular or oyster	2 11/16	4	5
No. 1 Maine style	3	4 7/16	8
No. 2 short or picnic	3 3/8	4	8½
No. 2 regular	3 3/8	4 9/16	10

"When cans of other sizes are used they should contain proportional weights of meat.

"It should be remembered that a loss of weight almost invariably occurs when clams are processed, and due allowance should be made for this loss in weighing the clams into the can. It is believed that the experience of the packers is such that there will be no difficulty in making the proper allowance for shrinkage in processing, thus avoiding shortage from this cause. It may be said that the investigations made in the Bureau indicate that the loss in weight in processing varies from about 5 to 15 per cent, the average loss being about 10 per cent of the weight of clams placed in the cans. The weights of drained clam meat should not fall below those given above, or, if a variation occurs, it should be as often above as below the weights specified. (Note: See Nos. 88, 134 and 379, post.)"[5]

[5] *Dunn, supra,* n. 1, Vol. 1, page 21.

No. 3. *"Weights of oyster meat required in cans of various sizes.*—This notice is issued to inform the trade that pending further investigation the weights agreed upon by the canners at their meeting in Washington, in October, 1912, will be regarded by the board as satisfactorily fulfilling the requirements of Food Inspection Decision No. 144. It is expected, however, that the 'cut-out' weight of all cans shall conform with this agreement, and where a variation occurs it shall be as often above as below the agreed weight. The weights which have been agreed upon are given below.

Size of can		Weight of drained oysters 'cut-out'
Diameter *Inches*	Height *Inches*	*Ounces*
2 11/16	2 3/4	3
2 11/16	3 6/16	4
*2 11/16	4	5
3 3/8	3 15/16	8
†3 3/8	4 9/16	10

*Known as No. 1 can †Known as No. 2 can

(Note: See Nos. 88, 134 and 379, post.)"[6]

Issued October 21, 1914[7]

No. 88. *"Quantity of the contents of canned oysters, canned clams, and canned shrimp to be declared on cut-out weights of the drained meat.*—In the opinion of this Bureau, the quantity of the contents of a package of canned (cove) oysters or canned clams, as usually packed and processed, should be declared on the basis of the cut-out weight of the drained meat. This also applies to canned shrimp.

"In this connection attention is called to letters

[6]*Dunn, supra,* n. 1, Vol. 1, pages 21-2.

[7]*Dunn, supra,* n. 1, Vol. 1, page 39.

Nos. 2 and 3, in Bureau of Chemistry Service and Regulatory Announcements for January 1914 (*sic* apparently should have been February 19, 1914, see *supra* No. 2 and 3), which state the weights of drained meat which, in the opinion of the bureau, satisfactorily fulfill the requirements of Food Inspection Decision No. 144 in the case of canned oysters and clams. (Note: This opinion has been modified; see No. 379, post.)"[8]

Issued August 18, 1915.[9]

No. 134. "Method of determining 'cut-out' weights of canned oysters and clams.—Inquiry has been made regarding the duration of the time of draining to which canned oysters and canned clams should be subjected before determining the 'cut-out' weight as specified in letters 2 and 3 of S.R.A., Chem. 1.

"The procedure adopted by the Bureau for draining in order to determine the 'cut-out' or drained weight is as follows:

"Make a circular cut almost around the top of the can, push the cut top back into its original position, invert, and allow the contents to drain through the circular opening for one minute. Pour the liquid through a collander and return to the can any weighable particles of solids which have been carried away by the liquid. The openings in the collander should

[8] *Dunn, supra*, n. 1, Vol. 1, page 40.

[9] *Dunn, supra*, n. 1, Vol. 1, page 46.

not exceed 3/16 inch in diameter. (Note: See No. 297, post.)"[10]

Issued February 14, 1923[11]

No. 379. "Declaration of net weight on canned clams and canned oysters.—Because the liquid packing medium in canned clams and canned oysters has a certain food value and is ordinarily utilized as food, no objection will be made to marking the net weight of these products in terms of total weight, liquid included. When such markings are made declaraton of drained or cut-out weight will not be required, but in all cases these weights should equal or exceed those specified in opinions 2 and 3, pages 1 and 2, Service and Regulatory Announcements, Chemistry 1.

"Opinion 88, page 688, Service and Regulatory Announcements, Chemistry 9, is modified accordingly."[12]

[10] *Dunn, supra*, n. 1, Vol. 1, page 48. Opinion No. 297 referred to in note was issued October 9, 1918 and relates solely to canned shrimp and is not pertinent herein.

[11] *Dunn, supra*, n. 1, Vol. 1, page 103.

[12] *Dunn, supra*, n. 1, Vol. 1, page 104.

APPENDIX E

(Exhibit 28—FDC 50)

Affidavit of David B. Charlton

DAVID B. CHARLTON, being first duly sworn, deposes and says:

My name is David B. Charlton. I am owner of Charlton Laboratories of Portland, Oregon. I am a graduate of the University of British Columbia with a major in Chemistry; Master's Degree from Cornell University, major in Bacteriology and minor in Chemistry; Ph. D. from Iowa State College, major in Bacteriology and minor in Chemistry. My experience consists briefly of the following: The years 1926-1928, Assistant Bacteriologist, City of Portland, Bureau of Health; 1929-1931, Instructor in Bacteriology, Oregon State College; 1934 to date, owner and director Charlton Laboratories.

Charlton Laboratories is an analytical and consulting chemical laboratory, including physical testing and food and sanitary bacteriology.

On June 11, 1948, I was requested to make a study comparing at least three different packs of oysters: (1) the Willapoint oyster, blanching process, (2) the presteaming pack in the Pacific Northwest by any other packer who utilized that method rather than the blanching process, and (3) any of the Southern packs of Cove Oysters. I was requested to make laboratory tests duplicating the commercial blanching and steaming pre-cook operations to determine their effect upon the volume of the oyster.

There is attached hereto as *Appendix A*, the laboratory certificate of Charlton Laboratories, Laboratory No. 20369-B, which shows the results of certain volume studies on raw oysters as affected by blanching and steaming pre-cooking processes of the *octrea gigas* type of oyster. It is largely self-explanatory. It shows that in the blanching process the oyster shrinks in volume an average of 2.76%, whereas in a steaming process the oyster shrinks in volume 16.66%.

I was further requested to make a Consumer Acceptance Test, by means of a so-called Food Panel, of representative brands of canned oysters as they would be used in the home for food. There is attached hereto as *Appendix B* the results of such a Food Panel which are largely self-explanatory.

I purchased on the open market at Hasson's Grocery, Portland, Oregon, cans of Willapoint brand oysters, Code Mark 115L, which I had been advised were of the *ostrea gigas* type and were processed by the blanching method. I also purchased on the open market at Save-Rite Grocery, Portland, Oregon, cans of Denco brand oysters, Code Mark 72S, which I had been advised were of the *ostrea gigas* type and were processed by the pre-steaming method. I also purchased at this grocery cans of the Tropical brand Cove Oysters of the *ostrea virginica* type packed in Louisiana and distributed by Tropical Food Company.

I requested Mrs. Cathrine C. Laughton, Director of Mary Cullen's Cottage, Oregon Journal, Portland, Oregon, to make a Consumer Acceptance Test and to

form a Food Panel consisting of herself and any two other qualified persons whom she might designate. Mrs. Laughton has been for many years the Director of this Cottage. This is the name used by the Oregon Journal in its regular women's page feature covering home service activities, including cooking. The Cottage has separate quarters with complete facilities for preparing, cooking and serving food. These facilities were used in conducting the Food Panel. She selected as one other member of the Panel the Assistant Director of Mary Cullen's Cottage, Mrs. Florence Kirkwood. Mrs. Kirkwood has been so employed for the past twelve years, and is a graduate of Oregon State College, Home Economics Department, with a Foods major, and has had past experience managing restaurants. The third member of the Panel was Mrs. Crystal Mathews, a relatively new employee of the Oregon Journal, but selected because she was a typical housewife.

The Food Panel test was as follows: I first removed the labels and all identifying marks from the cans, and then delivered them to Mrs. Laughton, identifying them only by number, and giving to the number 1 figure the Denco brand, to the number 2 figure the Willapoint brand, and to the number 3 figure the Tropical brand. The identity of the different brands was at no time known to Mrs. Laughton, Mrs. Kirkwood or Mrs. Mathews.

Mrs. Laughton conducted the test in my presence. The cans were opened by Mrs. Laughton in the presence of the other two members of the Food Panel and

myself, and prepared for serving in two typical dishes: oyster stew and fried oysters.

In preparation of the oyster stew the recipe used was standard, but seasoning and butter were omitted. Two cups of milk were brought to the scalding point, one cup of canned oysters with the liquid content of the can were added. The mixture was brought to a scalding point and served. In preparation of the fried oysters, the canned oysters were drained, dipped in commercial cracker meal (cracker meal made especially for breading), then dipped in one egg beaten with two tablespoons milk, then in cracker meal. Oysters fried in ¼ inch of melted margarine and shortening.

Each member of the Panel was requested to make an independent separate notation with respect to the appearance, texture and flavor of the oysters, and of the broth flavor of the stewed oysters, and of the appearance, texture and flavor of the fried oysters.

The detailed appraisals are set forth in *Appendix B*. They show some criticisms and some favorable points for each of the three brands, and show that the Willapoint oyster (number 2 in the test) was selected as the best by each of the three members of the Panel.

DAVID B. CHARLTON.

[Verification]

Laboratory Certificate

CHARLTON LABORATORIES
Portland 7, Oregon

Sub. Appendix "A"

Laboratory No. 20369-B

To: Willapoint Oysters, Inc.
423 Bell Street Terminal
Seattle 1, Washington

Subject: Oyster Studies

Date: June 30, 1948

Volume Studies on Raw Oysters and as Affected By Blanching and Steaming Pre-Cooking Processes

Volume in Cubic Centimeters

Sample Number	Raw	After Blanching	Percent Loss in Volume
1	81	78	3.7
2	102	100	2.0
3	77	75	2.6
Total	260	253	8.3
Average	87	84	2.76

Sample Number	Raw	After Steaming	Percent Loss in Volume
4	91	77	14.3
5	86	69	19.7
6	93	78	16.1
Total	270	224	50.1
Average	90	74	16.7

Comments:

1. Each sample number consisted of two (2) oysters shucked at the Laboratory.

2. Fresh raw oysters were purchased unshucked and in the shell on the open market at Lighthouse Oyster Company, Portland, Oregon. These oysters had

been delivered to this company from oyster beds in Willapa Bay for opening and retail sale as fresh oysters.

3. The blanching process consisted of duplicating in the laboratory the method used by Willapoint Oysters, Inc., specifically, dipping the shucked oysters in a boiling 5 per cent salt brine solution for 45 seconds, and on removal placing in cold water agitated with compressed air for a period of 6 minutes.

4. The steaming process consisted of duplicating in the laboratory the method commonly utilized in presteaming oysters in the shell by the Pacific Coast packers. Specifically, fresh shucked oysters were immediately placed in what is technically known as a Petri dish. This is a small flat glass container with a lid which fits closely down over the sides. It thus resembles the close fit of the shell around an unshucked oyster, thus preventing any direct washing action by the flowing steam. It was necessary to use this method rather than that of an oyster in the shell so that the volume of the oyster before and after steaming could be obtained. The Petri dish containing the test oysters was suspended in free-flowing steam over boiling water for a period of 15 minutes, thus allowing 3 minutes to bring the contents of the Petri dish to the desired temperature of free-flowing steam, and then to steam /2 minutes, which is the commercial practice.

CHARLTON LABORATORIES
DAVID B. CHARLTON

Sub. Appendix "B"

[Caption]

Detailed Reports of Members of Food Panel Making Consumer Acceptance Test of Canned Oysters at Mary Cullen's Cottage, Oregon Journal, Portland, Oregon, June 28, 1948.

Mrs. Cathrine C. Laughton—Director "Mary Cullen's Cottage"—Oregon Journal

Stewed Oysters

	No. 1	No. 2	No. 3
. Appearance	light in color delicate in appearance	gray—edges ruffled appearance good	brown rather unappetizing appearance
. Texture	bit stringy especially on edges	tender on edges but stomach of oyster so full of grit that it was very unpleasant	tender to the point of being mushy—almost a cooked cereal consistency
. Flavor—oyster	slightly chemical but not unpleasant —slight after taste	very good with a fairly fresh flavor	strong and metallic leaves bad after taste
. Flavor—broth	good with nice appearance but very little oyster flavor	very good—has true oyster flavor	stale flavor and a rank taste bad after taste

Fried Oysters

Appearance	rather tender to handle but had good appearance when fried	plump and good, frill stands out from oyster	good—uniform in size—plump
Texture	stringy and just slightly tough	good—has distinct texture without mushiness	slightly mushy
Flavor	slightly chemical flavor that hid much of oyster taste	good oyster flavor with a fresh taste	poor flavor except for breading, would hardly realize that these were oysters

No. 2 was better in many respects in both the stew and fried products. No 2 had a slight residue of sand in the stew. Appearance of No. 1 was better in the stew than either 2 or 3; but doubt if the appearance of either No. 2 or 3 would be at all noticed unless compared.

Mrs. Florence Kirkwood, Asst. Director "Mary Cullen's Cottage" (12 years); Graduate Home Economist, Foods Major (has managed restaurants)

Stewed Oysters

	No. 1	No. 2	No. 3
1. Appearance	Light	Gray	Brownish
2. Texture	Body tender Edge tough	Tender Some sand	Tough parts and others mushy
3. Flavor—Oyster —Broth	Strong Strong and a chemical flavor	Good Good full flavor but mild	Strong Strong flavor and somewhat stale

Fried Oysters

1. Appearance	Frays in handling	Holds shape Larger Dark stomach	Held shape in handling
2. Texture	Tough on edge	Very tender	More tender than in stew
3. Flavor	Definite chemical flavor	Good full mild flavor	Lacking in flavor

No. 2—Held shape best, had almost no tough outer edge—Had best flavor. Full yet not strong.

Mrs. Crystal Mathews, Oregon Journal (Typical Housewife)

Stewed Oysters

	No. 1	No. 2	No. 3
1. Appearance	Light	Gray	Brownish
2. Texture	Edge tough but body very tender	Tender A little sand	Not as tender as No. 2 and not as fi
3. Flavor	Salty Both broth and oyster strong Chemical flavor	Good flavor Mild	Strong and slight stale taste

Fried Oysters

1. Appearance	Does not hold shape entirely in handling	Larger and holds shape	Good shape
2. Texture	Edge tough as in stew	Tender	Tender
3. Flavor	Stronger salty taste but good	Mild flavor Very good	Very little oyster flavor. Not as stro as in stew

No. 2 Best oyster of three but No. 1 best looking before cooking.

[Caption]

Affidavit of Cathrine Laughton

CATHERINE LAUGHTON, being first duly sworn, deposes and says:

My name is Catherine Laughton. I am now and for several years have been engaged as Director of the Mary Cullen's Cottage. At the request of Mr. David B. Charlton I arranged for a Consumer Acceptance Test in the form of a Food Panel to appraise the quality of various types of canned oysters. I have read the affidavit of Mr. David B. Charlton which reports in full detail on the results of said study. To the best of my knowledge, all of the statements contained in his affidavit are true and correct, and fully and accurately state the results.

CATHERINE LAUGHTON.

[Verification]

[Caption]

Affidavit of Florence Kirkwood

FLORENCE KIRKWOOD, being first duly sworn deposes and says:

My name is Florence Kirkwood. I am Assistant Director of the Mary Cullen's Cottage. I participated as a member of a Food Panel to appraise the quality of various types of canned oysters. I have read the affidavit of Mr. David B. Charlton which reports in full detail on the results of said study. To the best of my knowledge, all of the statements contained in his affidavit are true and correct, and fully and accurately state the results.

FLORENCE KIRKWOOD.

[Verification]

[Caption]

Affidavit of Crystal Mathews

CRYSTAL MATHEWS, being first duly sworn, deposes and says:

My name is Crystal Mathews. I am a housewife and have also recently been employed by the Oregon Journal. I participated as a member of a Food Panel to appraise the quality of various types of canned oysters. I have read the affidavit of Mr. David B. Charlton which reports in full detail on the results of said study. To the best of my knowledge, all of the statements contained in his affidavit are true and correct, and fully and accurately state the results.

CRYSTAL MATHEWS.

[Verification]

(Exhibit 29—FDC 50)

[Caption]

Affidavit of J. M. Kniseley

J. M. KNISELEY, being first duly sworn, deposes and says:

My name is J. M. Kniseley. I am Manager of Laucks Laboratories Inc., Seattle, Washington. At the request of Willapoint Oysters, Inc., cans of Willapoint oysters, Code Number 190L, and of Surf Maid oysters, Code Number 5948, were purchased on the open market at Seattle, Washington, on June 14, 1948, and an analysis made with results as set out in the attached Report No. 102786-A.

J. M. KNISELEY.

[Verification]

Certificate

LAUCKS LABORATORIES, INC.
Seattle 4, Washington

Report No. 102786-A

Willapoint Oysters, Inc.
423 Bell Street Terminal
Seattle, Washington
Attention: Mr. R. H. Bailey

Gentlemen:

We hereby certify that we have purchased

OYSTERS

on the open market at Seattle, Washington, on June 14, 1948, and we have to report as follows:

Description of Samples

A—Willapoint Steamed Fancy Extra Large
Net contents 10½ oz. avoir.
Seasoned with salt
"Pride of the Pacific" Oysters
Willapoint Oysters, Inc.
Distributors
Seattle, Wash., U. S. A.

B—Surf Maid Brand Oysters
Drained Weight 6½ oz.
Distributed by: Miss Lou Ala Foods Co.
Gulfport, Miss.

Sample A was purchased at: Nelson's Quality Grocery, 325 West Galer, Seattle, Washington; Sample B was purchased at Safeway Stores, Inc., 1st Avenue North and Mercer, Seattle, Washington.

The samples were analyzed with results as follows:

	A	*B*
Drained weight (ounces avoir. per can)	5.55	6.64
Weight of liquid (ounces avoir. per can)	5.68	4.58
Protein in liquid	2.60%	1.75%
Solids in liquid	9.98%	6.30%
Weight of protein in liquid per can	0.15 oz.	0.08 oz.
Weight of solids in liquid per can	0.57 oz.	0.29 oz.

Respectfully submitted,

LAUCKS LABORATORIES, INC.
By J. M. KNISELEY

(Exhibit 30—FDC 50)

[Caption]

Supplemental Affidavit of David B. Charlton

DAVID B. CHARLTON, being first duly sworn, deposes and says:

I heretofore executed an affidavit in this proceeding on July 1, 1948. With respect to the food value of the so-called "packing medium" or liquid portion of Willapoint canned oysters, I have made an analysis and the results are presented in the table below. The can of oysters, Code No. 115 L, was purchased in the open market at Hasson's Grocery, Portland, Oregon. In the same table, figures for canned beans, peas, and clam bouillon are shown. These figures are taken from "The Canned Food Reference Manual," American Can Co., 1947. The figures for bouillon in the table are from an analysis I made on the contents of a can of Campbell's Bouillon (Beef Broth), Code 2 J 718, purchased on the open market at Hasson's Grocery, Portland, Oregon.

	Protein	Fat	Ash	Moisture	Carbohydrates
	%	%	%	%	%
Willapoint Oysters Liquid portion only ..	2.32	0.02	1.25	91.27	5.14
Canned green and wax beans	1.1	0.3	0.5	95.1	2.5
Canned peas	3.4	0.3	0.4	88.1	6.8
Canned Clam Bouillon	1.4	....	2.3	94.8	1.5
Canned Bouillon (Beef broth) Campbell's brand	3.68	0.6	2.12	91.9	1.7

It is of interest to note that the liquid portion of Willapoint canned oysters has a significant food value quite comparable to the entire contents of other well known canned foods.

DAVID B. CHARLTON.

[Verification]

APPENDIX F

Rejected Exhibits 39, 40, 41, 43 and 44—FDC 50
(R. 1167-1177)

(EXHIBIT 39—FDC 50)
(Not admitted)
AFFIDAVIT

State of Washington, County of Pacific—ss.

GEORGE ESVELDT, having first been duly sworn makes the following statements on oath: I am the manager of the South Bend, Washington, plant of the E. H. Bendiksen Company and have been so employed since October 1, 1944; that in this capacity I am responsible for the packing of the canned Pacific oysters grown, processed, and marketed by this firm.

That the E. H. Bendiksen Company attempted during the period between June 10, 1948, and June 30, 1948, to pack Pacific oysters in compliance with the new fill standard. In making an honest and sincere effort to comply with this regulation the following difficulties were encountered in the plant operation:

1. Filled cans containing eight and one-half ounces of pre-steamed, shucked, washed oyster meats passing under the salt tablet dispenser where they would ordinarily receive a 40-grain salt tablet were so full of oyster meats that in the case of about thirty to forty per cent of the cans, the salt tablet would drop on to the oyster in the top of the can and then bounce off onto the packing table or floor. This, of course, resulted in these cans going to the sealing machine without the required tablet.

2. When the filled cans passing down the chain from

the salt tablet dispenser to the topper and sealing machine passed under the boiling water spray which is used to heat the contents of the cans sufficiently to guarantee adequate vacuum an insufficient quantity of hot water entered the cans. The low vacuum of the resultant pack severely limited its commercial value.

3. In accordance with the recommendations of the American Can Company, our Canco 00-6 sealing machine has, for a number of seasons, been equipped with a topper consisting of four rotating plungers geared to the sealing machine in such a way that each can passing into the machine passes under a plunger which presses down into the top of the can and its contents about one-fourth of an inch. The purpose of this plunger is to force out a sufficient quantity of the water or other packing medium employed to insure a uniform head-space in the sealed cans, without which adequate vacuum in the sealed cans cannot be obtained. As soon as the fill-in weight of the EO cans was increased to 8½ ounces and the cans were conveyed to the topper with two or three oysters projecting from one-half inch to an inch above the surface of the can, a severe loss began to be experienced. The action of the essential topper plunger entering the overfilled cans caused the expulsion of most of the small quantity of water in the top of the can, and in the majority of the instances, also forced a portion of one or more oysters over the edge of the can. This resulted in injury or breaking of these top oysters, and in the filled cans passing to the sealing mechanism with a portion of one or more oysters hanging over the side of the top of the can. The plungers on the

topper were adjusted to the highest possible level commensurate with essential headspace but nothing could be done to correct this unfortunate situation.

4. When the filled cans with projecting oyster meats passed from the topper to the actual sealing mechanism, all the portions of oyster still hanging over the edge of the can were severed and lost, falling into the machinery, and on to the floor around the base of the sealing machine. Since this situation applied to at least half or two-thirds of the cans passing through the machine, a run of only two or three hours produced an actual loss of expensive oyster meats which could be measured by the pound, in addition to the tremendous loss of quality and appearance of the finished product in the can occasioned by the top oyster or two being mangled or cut in two with only a portion remaining in the can. All the ingenuity of the packers and machine man was inadequate to work out a passable solution to this problem and nothing could be done to eliminate the terrific loss in quantity and quality of the expensive oyster meats being processed.

5. An analysis of our payroll data for the June 10th to June 30th trial period when we packed in compliance with the new fill standard as compared with the period of June 1st to June 9th immediately preceding the adoption of this standard, revealed an increased labor cost for grading and packing of 50.4% attributable directly to the increased difficulty of meeting the new fill.

To illustrate some of the problems encountered in complying with the new fill of container for canned oysters the services of a commercial photographer

were obtained to take a series of photographs of our plant operation. These pictures were taken on June 22, 1948, after the plant had been in operation for approximately three hours, and represent accurately the canning losses experienced by this firm every day of the trial period during which an attempt to conform to the new standard of fill was made. The photographer was on hand when the packers finished packing, and the last case or two of filled cans which were ready to be placed on the packing chain were utilized in the photographs. All of the cans shown contain an accurately determined fill of 8½ ounces of pre-steamed, washed oyster meats, packed under commercial conditions, without the packers being made aware that they were anything but routine pack.

Considering these photographs in the sequence of their occurrence on the packing line, I would like to make the following comments:

Picture No. 1—Illustrates the amount of oyster meats required to attain fill-in weight of 8½ ounces. Note that there is practically no empty space in the top of the cans passing down the chain to the salt dispenser. The accumulated salt tablets on the table in front of the tablet dispenser represent the loss of salt tablets occasioned by their bouncing off the top of the full cans in less than one hour, and do not tell the whole story since almost as many tablets fell on the floor during this same period of time. Ordinarily, the machine operator cleans up this salt every few minutes, but on this occasion he was informed less than an hour before the arrival of the photographer

that the tablets lost during the next hour were to be retained. Instead of leaving each tablet in the position where it fell, he misunderstood his instructions and bunched them together into a pile with his hands. No salt tablets were added to or removed from the table, however, during the hour of operation referred to. Naturally, each salt tablet represents a can of oysters that passed to the sealing machine without this essential flavoring and each of those salt-less cans will reach a consumer with inadequate or "flat" flavor.

Picture No. 2—Illustrates the floating up of the oyster meats in the filled cans after they pass through the boiling water spray which is intended to heat the cans for the introduction of vacuum and provide a packing medium of hot water as well. The chain conveying the cans to the machine is moving at a rate of 58 or 60 cans per minute and the oysters continue to rise in the can for a few seconds after they leave the boiling water spray. Careful observation of the cans on the chain and turntable from the end of the hot water pipe to the topper will reveal that the meats continue to float up all the way to the topper. This picture was taken while the chain and sealing machine were in action.

Picture No. 3—Illustrates clearly the operation of the topper plunger on the overfilled cans. The machine operator was instructed to stop his machine with a can of oysters directly under the plunger and this photograph was taken with the machine out of gear. Note the fragment of what was seconds before a perfect whole oyster hanging over the edge of the can under the plunger. Also note how the cans approaching the plunger seem to be bulging with oysters due to the floating action

of the hot water. Attention is called to the fact that the packers of most of the cans shown in this photograph have attempted to wedge the top oyster in the can across the mouth of the can in such a way as to minimize the floating. Note the "roiliness" of the hot water in the cans closest to the hot water spray which indicates that the air trapped in this water from the spray has not yet had time to escape.

Picture No. 4—Illustrates what happens to an oyster when it hangs over the edge of the can during the sealing process. The machine operator threw the canning machine out of gear at exactly the right moment, and the photographer was able to take a still photograph showing part of an oyster projecting from the top of the can as it was being lifted up to the lid. When the machine was placed in gear again a moment later, the overhanging portion of this oyster was clipped off and fell into the machinery. Note similar pieces of lost oyster meats littering the sealer. Naturally if this can were opened later, the top oyster would not be a fancy whole oyster but a mutilated cut oyster greatly inferior in both quality and appearance to the perfect oyster placed in the can only a moment before by a packer.

Picture No. 5—Illustrates the cumulative litter of oyster fragments obtained in less than three hours' operation of this sealing machine. Each small fragment of an oyster represents a can of imperfect pack which has passed through this machine in that time. Despite every effort of the experienced employees to pack and seal a top-quality product a large percentage of the cans passing through the sealer contained one or more badly mutilated oysters.

On the basis of the packing experience acquired during the trial period of June 10th to June 30th it is my opinion that the new fill of container for canned oysters is so excessive as to be commercially impractical for the canning of Pacific oysters.

(s) GEO. D. ESVELDT.

Subscribed and sworn to on this 9th day of July, 1948.

(SEAL) (s) W. TODD ELIAS,
Notary Public in and for the State of Washington residing at South Bend.

(Exhibit 40—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

AMANDA STROMSNESS, first being duly sworn, deposes and states on her oath as follows: I have been employed the past three years as a packer at the E. H. Bendiksen Company oyster plant in South Bend, Washington. I liked packing oysters very much until I had to pack the new fill which we did from about the 10th of June of this year until the end of June. It don't only cut down the speed but it is also hard to pack the oysters in the cans so as not to break them.

The long and skinny oysters take more room than the round and fat ones and so it is almost impossible to get a nice pack out of them. We get lots of both kinds. The long and skinny ones don't weight as much but are even harder to get in the can with breaking them.

With the new weight the oysters have to be crammed down in the can and broken or else left sticking out of the can and later cut off by the canning machine. I did the very best I could and I just don't see how I can do the new pack and make them fit or look as nice as they should. I hope we don't have to pack the heavy weight.

AMANDA STROMSNESS.

Subscribed and sworn to before me this 9th day of July, 1948.

(SEAL) W. TODD ELIAS,
Notary Public in and for the State of Washington residing at South Bend.

(Exhibit 41—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

CLARA SMITH, having first been duly sworn on oath makes the following statement: I have been employed at E. H. Bendiksen Company as an oyster packer for one season. This oyster company is located in South Bend, Washington.

All through the past season we packed oysters at the plant with a six and three-quarter ounce packing weight until the last three weeks of June just before the cannery closed for the season, when we were told by our foreman, Mr. Alvenes, that we had to pack heavier cans for the rest of the month. The new weights we were given to pack with weighed eight and one-half ounces and as soon as we started to

use the new weight we ran into a lot of trouble. It took us a lot longer to fill the cans because we had to pick the oysters over so much to get the right size and shape to pack in the can, and we had to put so many oysters in the can to get our counterweights to balance that we had to "cram" them in. Steamed oysters are pretty tender and jamming them into the can caused a lot of tearing and breaking which we never had before.

We girls on the packing line disliked packing the new weight because we have always been cautioned to not pack anything but perfect oysters and we hated to see the top oysters in the can we packed being mashed and cut off in the sealing machine. In order to get enough weight in the cans we had to leave oysters sticking out the top of the can most of the time and they were smashed when the cans went through the machine.

One trouble I had was in getting the right weight in the can with the large oysters. When the can was almost full one more oyster made too much weight and the meat stuck out of the can, and if I took one oyster out of the can the weight would be too low.

I think the new weight is entirely too much to make a decent looking can of oysters and I couldn't pack the weight without crushing and ruining my oysters.

(s) CLARA SMITH,

Subscribed and sworn to before me this 9th day of July, 1948.

(s) W. TODD ELIAS,
Notary Public in and for the State of
(SEAL) Washington, residing at South Bend.

(Exhibit 43—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

MAUDE BAIRD, being duly sworn deposes and states on her oath as follows:

I am employed at E. H. Bendiksen Company in South Bend, Washington, as an oyster packer. I have been employed in the oyster industry as a packer for about four years.

I do not like the new pack because my speed was cut down considerably. This pack, I feel, will not work out satisfactorily because the quality of the oysters when put in the cans is good, but by trying to get the new weight the oysters are broken up and crammed into the cans, which leaves no space for the liquid to cover all the oysters, therefore hurting the appearance of the oysters, and in time ruining the sale of the product, I'm sure.

There is another angle. The size of the oysters vary for each season so that the weight is very hard to get exact. The oysters may look like they will weigh heavy but still not weigh enough, then some oysters are small, others are long and skinny. The large ones have to be broken up to make the exact weight.

We are warned continually to not break the oysters and pack them in the cans so that every oyster, when taken out of the can looks the same as when they were put in the cans.

So I can't see how the new weight can possibly work out to satisfaction. (s) MAUDE BAIRD,

Subscribed and sworn to before me this 9th day of July, 1948.

(s) W. TODD ELIAS,
Notary Public in and for the State of
(SEAL) Washington, residing at South Bend.

(Exhibit 44—FDC 50)

(Not admitted)

AFFIDAVIT

State of Washington, County of Pacific—ss.

FANNIE STOUTENBURG, having first been duly sworn makes the following statement on oath:

I started working in the E. H. Bendiksen Company oyster plant in October of 1947 and I like to pack oysters very much, but when we had to start on the new fill I found it much slower. We had to try and get too many oysters into the can to get the right weight and when we had the long skinny ones you couldn't help breaking them.

Our foreman has always told us that we shouldn't break our oysters any so that way I found it very hard to get the right weight with this new fill. I don't think this new fill looks so nice in the cans because there would be oysters sticking up in the cans which got cut off in the canning machine. I just think the new fill is too much.

(s) FANNIE STOUTENBURG,

Subscribed and sworn to before me this 9th day of July, 1948.

(s) W. TODD ELIAS,
Notary Public in and for the State of
(SEAL) Washington, residing at South Bend.